

see V. 2455

N. 2455

No. 11483

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LARRY FINLEY and MIRIAM FINLEY,

Appellants,

vs.

MUSIC CORPORATION OF AMERICA, a corporation,
H. E. BISHOP and LAWRENCE BARNETT,

Appellees,

and

MUSIC CORPORATION OF AMERICA, a corporation,
H. E. BISHOP and LAWRENCE BARNETT,

Appellants,

vs.

LARRY FINLEY and MIRIAM FINLEY,

Appellees,

TRANSCRIPT OF RECORD

(In Four Volumes)

VOLUME III

(Pages 657 to 992, Inclusive)

Upon Appeals from the District Court of the United States
for the Southern District of California,


Central Division

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(Testimony of Larry Finley)

Mr. Finley, you testified to a telephone conversation with Mr. Hal Howard in the month of February, 1945, where he spoke to you that he had certain bands available?

A. Yes.

Q. Now, that was after your conference with Mr. Joe Ross. You remember you testified you went to see Mr. Joe Ross, the attorney, with your lawyer?

A. That is right.

Q. And then a few days later Mr. Hal Howard telephoned to you, and in my note here, he discussed with you about submitting to you Bob Chester, Jack Teagarden and Ted Fio Rito?

A. That is right.

Q. They were all three name bands?

A. Yes.

Q. And you had a conversation with him?

A. I believe I stated in my testimony I didn't recall—

Q. Just answer my question.

A. —whether Mr. Howard or Mr. Bishop. I would like to correct that. I don't remember who it was that called. There was a telegram at the time and a telephone conversation.

Q. It was either Mr. Bishop or Mr. Howard you talked [730] to?

A. That is right.

Q. And in that, they offered you these three bands?

A. That is right.

Q. And you asked them the prices?

A. That is right.

Q. And you said you would not pay that price?

A. I said that, in addition to other things, Mr. Doherty.

(Testimony of Larry Finley)

Q. First, you refused on the ground of price, did you not, one of the grounds?

A. Well, the first ground I refused on was the fact that the week before they had played the Square, two bands in one evening, and I would only have one for one evening. That was my first basis for refusal.

Q. Were they offering you the bands for the immediate week that they were talking to you, on February the 25th, or whatever the date was?

A. I believe it was a week and a half off. I don't quite recall. I know it was right soon.

Q. Then, you were objecting, first, on the basis that the date they were offering you the band was too close to the previous engagement?

A. There were two objections. One was the date, the fact that the date was too close to an engagement where both [731] bands had appeared at the ballroom together on one night in a so-called "battle of music." The other objection was the fact that the price to me for a two-night engagement was in excess of the price the Pacific Square paid for a three-night engagement.

Q. That is, you wanted to fix the price, didn't you?

A. Yes; I definitely wanted the price fixed, and especially on Fio Rito. I offered to take Fio Rito if I was offered a proportionate price; but I couldn't see paying \$1100.00 a night when the Square paid him \$700.00 a night, or somewhere in that proximity.

Q. And one of your objections was that the price was too high, according to the way you figured it?

A. That is right.

Q. When you hired Tommy Dorsey in New York who fixed the price?

A. Tommy Dorsey.

(Testimony of Larry Finley)

Q. And when you hired Jimmy Dorsey in New York who fixed the price?

A. His manager. I should say that Tommy Dorsey's managed fixed the price.

Q. In each instance they fixed the price?

A. That is correct.

Q. And Tommy Dorsey, your partner, fixed the highest price he had ever been paid for a single engagement, did he [732] not?

A. Well, the price was discussed before we discussed—

Q. No. Answer my question. Didn't you testify here yesterday that Tommy Dorsey said that was the highest price he had ever been paid for an engagement?

The Witness: Will you read the question back to me again, please? I am sorry.

(Pending question read by the reporter.)

The Witness: The previous question to that.

(The last previous question was read by the reporter.)

Mr. Doherty: I am speaking of a dance hall engagement.

A. Yes. The answer is yes, Mr. Doherty.

Q. Now, you remember after this conversation with Hal Howard about the bands that you could have, that you got a letter from him?

A. I honestly don't recall if it was a letter or a telegram, Mr. Doherty.

Q. I will show your counsel a carbon copy of a letter, and after he has examined it I will let you see it.

The Witness: All right.

(Testimony of Larry Finley)

Mr. Doherty: To save time, Mr. Christensen, I made a typewritten copy. You can be looking at the typewritten copy—

Mr. Christensen: Oh, surely.

Mr. Doherty: —while I show the original to Mr. Finley; and in that way we will move along more rapidly. [733]

Mr. Christensen: Well, thank you.

Q. By Mr. Doherty: I will ask you if you remember receiving the original of that letter? [734]

A. Yes, I think I do, Mr. Doherty. I believe I do recall receiving that.

Q. And it was received on or about the date that it bears, February the 27th, 1945, allowing for the usual time of postage from Los Angeles to San Diego?

A. Yes.

Mr. Doherty: May we introduce this, your Honor, as the next defendants' letter in order?

The Court: So ordered.

The Clerk: That is Defendants' Exhibit K.

Mr. Doherty: May I read it to the jury, your Honor?

Dated February 27th, 1945, Defendants' Exhibit K,
Mr. Reporter.

"Mr. Larry Finley

"Mission Beach Ballroom

"San Diego, California

"Dear Larry:

"Confirming our telephone conversation of today whereby you were submitted Bob Chester and His Orchestra for March 16, 17, and 18 at \$2,500.00 against 50%;

(Testimony of Larry Finley)

Jack Teagarden for March 30, 31, and April 1 at \$2,500.00 against 50%; and Ted Fio Rito on March 23, 24, and 25 and-or March 30, 31 and April 1 for \$2,500.00 against 50% each series of three nights. [735]

"These attractions have done well on engagements not only in your territory in the past but throughout the country and have established reputations and prices in line with those which we are quoting.

"During a prior conversation that I had with you you advised you would possibly operate three nights a week. On bands the caliber of those we are discussing, as there are few engagements in this territory to fill up the early week days, the weekend dates must at least cover the operating expense and minimum salary of the organization or, of course, it is to our interest and that of the band's to route them out of the territory, where they could possibly play five or six engagements a week, thus realizing considerably more for their services than if they layed off in order to play your weekend engagement, and that is why there is little difference between a two-day and three-day price.

"I am sure that the Curt Sykes orchestra would have been a good suggestion for you for Ratcliffe's, however, I understand that this booking has been filled.

"As we are now making plans for the itineraries [736] on these bands, in case you desire to reconsider your refusal, it is important that you communicate with us at once.

"Yours very truly,

"Hal Howard."

(Testimony of Larry Finley)

Q. Now, one of the discussions was between you and Mr. Howard or Mr. Bishop, whichever you recollect having discussed the matter with you; you wanted a two-night operation? A. That is correct.

Q. And he wanted to sell you or assign to you a three-night operation, is that right?

A. Part of it is right, Mr. Doherty. You see, I recall telling him that if I could get some real bands in there, that I would go to a three-night 'week basis; and that is where he got that part, according to our conversation, of probably going to three nights a week.

Q. But you wanted these bands in—

A. On a two-night operation.

Q. —for a two-night operation?

A. That is right.

Q. And you wanted the rate lowered for two nights as compared with what we charged for three nights?

A. That is correct; yes.

Q. And that is another reason that you rejected the [737] offer, was it not? A. That is correct.

Q. Yes. Now, after you received that letter did you answer it?

A. I don't recall if I did or not.

Q. Now, be sure you are accurate on this, as I know you will try to be on all your answers, Mr. Finley.

A. I am trying to answer you.

Q. From the date you got that letter, when did you next ask or suggest the M. C. A. supply you with any band at Mission Beach?

A. One occasion was when Mr. Bishop spoke to me.

(Testimony of Larry Finley)

Q. That was in September and October of 1945?

A. That is right. I don't think I asked them for any bands until September.

Q. Yes.

A. Or, pardon me. It wasn't September.

Q. It was in September?

A. It was not in September. It was in—yes; it was in September. It was around part of September. I thought it was earlier. Around September, yes.

Q. I am only quoting, Mr. Finley, your testimony of this morning. You said September and October, 1945.

A. It was around September; that is right. I didn't ask them for any and they didn't offer me any. [738]

Q. Yes. The fact is, they were talking to you about bands down at the Casino and they asked you, Mr. Bishop, upon one occasion, and also Mr. Barnet on another occasion, how you were getting along at Mission Beach; and you held up your hands and said, "My lawyers won't let me talk to you about it."?

A. That is definitely untrue. It is not so.

Q. You never at any time told anyone that you could not talk about the Mission Beach operation because this lawsuit was pending?

A. That is definitely untrue, I stated.

Q. At no time? A. At no time.

Q. You employed your attorneys to bring this suit, did you not, in the month of February, 1945?

A. No; I think it was in the month of March.

Q. What date in March, keeping in mind the action was filed here on March 20, 1945?

A. I don't recall. I think it was during the first part of March. I don't recall the date, however.

(Testimony of Larry Finley)

Q. Well, you consulted them, did you not, in February?

A. Yes. I went to see Mr. Ross with them in February.

Q. You consulted them around about the 20th of February, didn't you?

A. I don't remember the exact date. That might be so. [739]

Q. Would that be approximately the date?

A. I can't say for sure. It might have been later, Mr. Doherty. I really don't know.

Q. Well, how much later, now, Mr. Finley?

A. I stated that I don't know, Mr. Doherty. It was sometime the latter part of February or the first part of March. I imagine it was just previous to the date of the filing of the action. You say that was March 20th.

Mr. Doherty: We can agree, can we not, Mr. Christensen, that the action was commenced—

The Court: Just look at the file there before you.

Mr. Doherty: —March the 20th, 1945?

Mr. Christensen: I had in mind March 24, 1945. March 20th is correct, sir.

Q. By Mr. Doherty: With that date before you, will you tell us when you first consulted your attorneys respecting bringing this action?

A. I imagine—pardon me. I imagine it was the last part of March, Mr. Doherty. I cannot say for sure, however.

Q. You knew, did you not, Mr. Finley, before you signed the lease with the City of San Diego, that there

(Testimony of Larry Finley)

was some sort of a contract with the Pacific Square, Mr. Dailard, and M. C. A. respecting bands?

A. Before I signed the bid, do you mean, Mr. Doherty?

Q. No; before you signed the lease. [740]

A. Before I signed the lease. Well, I knew there was a deal, but I didn't know just what the substance of it was. In fact, I didn't know that until I saw them attached to the depositions. I didn't know exactly. I knew there was a deal, however.

Q. Why, Mr. Finley, you knew, did you not, before you signed the lease that Mr. Dailard was claiming an exclusive contract?

A. Oh, yes; quite so.

Q. You knew that?

A. Yes; quite so.

Q. And you knew that before you signed the lease with the City of San Diego?

A. That is correct.

Q. And you went ahead and signed the lease without inquiring of Mr. Dailard or the M. C. A. just what the contract was?

A. Well, I was advised by M. C. A. that as long as Dailard had bands at Mission Beach, there was no reason why I couldn't get them from them. That is why I signed the contract.

Q. Mr. Howard told you—

A. And Mr. Barnet told me it would be tough, and he would get something for me.

Q. He said it would be tough? [741]

A. Yes.

Q. Mr. Howard went into your place, I think it was September, 1945, into the Trianon; you testified that he came in there and discussed bands?

Mr. Christensen: 1944, Mr. Doherty.

(Testimony of Larry Finley)

Mr. Doherty: 1944. Mr. Christensen is correct. Thank you.

A. I don't believe it was September, Mr. Doherty.

Q. Was it October?

A. I think it was about November, if I am not mistaken. Yes; I am quite sure it was. If I may think for just a moment?

Q. I am going to help you on it, so I think you—

A. It was the night of October the 30th—November 8th, the Night of November 8th that Mr. Howard was in my ballroom.

Q. No. But you remember, Mr. Finley—and this is not to catch you, but this is to help you, and I am sincere in this—

A. Yes, sir.

Q. Do you remember that you testified that Mr. Howard came into your place at the Trianon and said that he was working for M. C. A., and then he made an appointment with you to see Mr. Barnet in Beverly Hills and you came up?

A. That is not right, Mr. Doherty.

Q. Then, we will go back. I will take your correction. [742] The first time you saw Mr. Howard, then, was the evening of November the 8th in the Trianon?

A. No; that is not right, either.

Q. Well, when did you first see him?

A. I saw Mr. Howard in Los Angeles.

Q. When?

A. It was either the—I don't recall if it was the latter part of September, or I believe it was the first part of October that I saw Mr. Howard in Los Angeles, or in Beverly Hills, I should say.

(Testimony of Larry Finley)

Q. And then he made an appointment for you to see Mr. Barnet?

A. No. I spoke to Mr. Howard on the telephone.

Q. Well, answer my question yes or no. Did Mr. Howard make an appointment with Mr. Barnet to see you?

A. Did Mr. Howard make an appointment with Mr. Barnet? He made an appointment with me to see Mr. Barnet?

Q. Yes. A. Yes; that is right.

Q. And you saw Mr. Barnet and Mr. Howard together? A. That is correct.

Q. And that was before the bids were opened, was it not? A. That is right; yes.

Q. And the bids were opened on October the 30th? [743]

A. October—that is correct.

Q. Then, you saw Mr. Howard before the bids were opened? A. Yes.

Q. And you saw Mr. Howard and Mr. Barnet before the bids were opened?

A. I saw Mr. Howard and Mr. Barnet before the bids were opened. I did not see Mr. Howard alone. I spoke to Mr. Howard on the telephone from San Diego, discussed it with him, and he suggested that I come up and see he and Mr. Barnet, which I did. That was prior to the time that the bids were opened; just how much prior, I don't recall.

Q. And I believe during these various conversations you never met Mr. Jules Stein?

A. The first time I met Mr. Jules Stein was in the lobby of the Beverly Hills Hotel one night.

(Testimony of Larry Finley)

Q. And I believe you said that whatever Mr. Howard may have done or Mr. Barnet or Mr. Ames Bishop, that you believed that Mr. Jules Stein did not know anything about it?

A. I did not say that to Mr. Stein.

Q. No, but you have made that statement, have you not?

The Witness: Will you repeat the statement? I don't know if you are quoting me word for word or not, Mr. Doherty, and I would like to have it repeated, if I may. [744]

(Question read by the reporter.)

A. I didn't say that, Mr. Doherty. I said something similar, but I did not say that. I said something similar but I did not say that.

Q. Was not that the substance of it, Mr. Finley?

A. No. I stated that I didn't think Mr. Stein knew the way I was being pushed around. That is what I said. That is in my deposition taken at Mr. Warne's office.

Q. Respecting your damages in this case, I will direct your attention to this one statement in your deposition, turning to page 189, beginning at line 16. This is the deposition taken upon October 8, 1945, of Larry Finley, in which you were represented by Mr. Rau.

The Witness: Rau.

Q. Rau, R-a-u, and the defendants were represented by Mr. Clore Warne; and I will ask if these were not the questions and answers at that time—189, beginning at line 16:

(Testimony of Larry Finley)

"Q. By Mr. Warne: First, have you estimated that in any fixed number of dollars up to this time?" Now, Mr. Warne previously had been asking about damages.

"A. No; I haven't.

"Q. Did you at the time you brought this lawsuit, did you at that time compute the damages which you had suffered at that time? Answer yes or no.

"A. At that time I had no damages as yet. I could [745] see damages coming."

Q. You so testified?

A. I signed that; yes. [746]

Q. This matter of name bands is really a matter of opinion, is it not, Mr. Finley, as to what is a name band?

A. Yes, it seems to be an opinion of ballroom operators against opinions that bookers have.

Q. I mean, it is a matter of *pinion*, is it not?

A. Yes and no, I would say to that, Mr. Doherty.

Q. I will ask you to look at the deposition, page 82, the same deposition, beginning at line 8. If you will push it over this way, I can read it a little better.

A. I remember that. I know what it is.

Q. The question was, Miss Reporter:

"The question of what is a name band is essentially a matter of opinion—strike that. The question of whether a band is a name band is essentially a matter of opinion, is it not?

"A. You could be right but not—you could be, but you might not be right, Mr. Warne. As far as a definition of a name band is concerned the definition would be a matter of opinion." You so testified?

A. Yes.

(Testimony of Larry Finley)

Q. About putting bands in places like San Diego, Mr. Finley, from your knowledge, isn't it a bad policy to book a band twice in a community of that size, either in the same or adjacent or competing locations, too close together? [747]

A. I am sorry. I don't get your question.

Q. Probably I didn't state it very accurately. Isn't it a bad policy to book too close together, I mean in dates,—

A. Yes.

Q. —the same band in the same location, or in competing locations, in cities the size of San Diego?

A. I wouldn't say that it was, Mr. Doherty, not at all. San Diego is a big city now.

Q. Yes. Then it is perfectly all right to book a band at Pacific Square one week and at Mission Beach the next week?

A. If it is a good enough band to—if it is a big enough name band to warrant attendance at the box office, the answer is yes.

Q. Yes. And you didn't think that Jack Teagarden or Bob Chester was a big enough band to even date a month apart?

A. I stated the reason for not booking Chester and Teagarden, Mr. Doherty. It is the same as in the motion picture business, where you see a double feature picture at one theatre one week and then have to pay the same admission to set just one of those pictures at a later time. There were two bands at Pacific Square on one week-end, Bob Chester and Jack Teagarden, alternating on the bandstand, and I couldn't see booking them a month later when the talk around [748] town of the kids was that the music was bad. I couldn't see booking them into

(Testimony of Larry Finley)

Mission Beach, especially after what happened at Pacific Square. We were competing, and I wouldn't take half of what had been a full attraction at the Square. That is the primary reason I wouldn't book Chester or Teagarden.

Q. But the real objection was, wasn't it, because they wanted to charge you the same price for two nights?

A. I stated my objection, Mr. Doherty.

Q. And you want to stand on that. A. Yes.

Q. Now, you remember this conversation down at the Trianon between Mr. Bishop and Mr. Howard and yourself after the contract was awarded that you have related in some detail? A. Yes.

Q. Did not also in that conversation something like this take place, that you told Mr. Bishop, in particular, that Mr. Dailard was paying too much for his bands and you were not going to pay M. C. A. the prices that Dailard was paying, in substance and effect?

A. I don't remember anything like that.

Q. Don't you remember saying that Dailard was paying M. C. A. bands too much?

A. I don't think I ever said anything like that. That is the comment in the trade, but that is not what I said. [749]

Q. You say that was known in the trade?

A. I say that is the comment in the trade, but I don't believe I ever said that to Mr. Bishop.

Q. The comment you had heard was that Mr. Dailard was paying too much for his bands at Pacific Square?

A. Yes, sir.

(Testimony of Larry Finley)

Q. Do you not remember saying in the same conversation that you were going to do business with M. C. A. on your terms and not on their terms, or words to that effect?

A. That is a deliberate misstatement; I mean that statement.

Q. But you did have a talk at that time with Mr. Bishop and Mr. Howard?

A. Yes. That I said I would do business on my terms, Mr. Doherty, is that what you said?

Q. Yes, that you were going to do business on your terms. A. Definitely not.

Q. Now, on your improvements out there at the Beach, you couldn't begin any improvements until January 3rd, could you?

A. No, January the—my lease stated that I took possession on January 3rd and Mr. Dailard's lease stated that he gave it up at midnight, December 31st, and I had a discussion with somebody from—either Dailard or Wakeland, [750] I don't remember, and the City Manager, whereby I agreed to let him run, to have his New Year's Eve, and we started in the day after New Year's, January 2nd, to take possession of the park.

Q. Well, you didn't begin any improvements, my question was, until after January 3rd?

A. That is approximately right.

Q. Those were war times, were they not?

A. Yes.

Q. And you had to get priorities for material?

A. Yes.

(Testimony of Larry Finley)

Q. Did you have to get priorities also for men?

A. I don't recall if we did or not. I contracted it out. We used mostly secondhand material, but I will state that all the building and all the altering we did was in strict compliance with the War Production Board.

Q. I am not questioning that, Mr. Finley. But you had to get priorities?

A. I don't recall if we did or not. As I say, whatever we had to do, we did; whatever we were supposed to do, we did.

Q. Were you able on January 3rd to say just when you were going to open? A. Yes.

Q. You were certain that you would have all your [751] repairs finished, irrespective of priorities, in 30 days?

A. No. You see, I started working—we didn't start any physical work before January 3rd, but the mental work I did much before that time. For example, my contract to paint the ballroom I let, I think, in December, the first part of December. My arrangement with the people, the decorators who painted the ballroom, was that every day over the specified time that they ran we would deduct, I think, \$500.00 from the price of the bid they gave me. That was all done prior to that.

Q. When did you definitely fix the date? What date did you fix February 3rd as your opening date?

A. When did I fix that?

Q. Yes.

A. I don't remember. Probably some time in December. I think it was some time—no, it was previous to December. We had our advertising out January 3rd. I

(Testimony of Larry Finley)

think I made up my mind on that date as soon as I got the lease, Mr. Doherty.

Q. That is, even before you decided what the repairs were going to consist of, you had fixed on your opening date?

A. I think I did. The lease stipulated the park could remain closed in the month of January for alterations, and I think I made up my mind at the time the lease was let.

Q. And you were sure you would get priorities in wiring, and all the rest of it? [752]

A. Well, I know on wiring we used nothing but second-hand wiring; and the morale—you see, in San Diego the park was very important to military morale, which helped us a great deal in getting things done.

Q. Now, I will show you Plaintiff's Exhibit 1, which is the pictures of Mission Beach Ballroom. Did you take those?

A. No, I did not.

Q. Were they taken under your direction?

A. Yes.

Q. Were you present when they were taken?

A. No.

Q. Who hired the photographers?

A. Either I hired them, or Mr. Austin hired them. I don't recall. I told Mr. Austin to have the pictures taken, and he had them taken.

Q. And who directed the taking of the pictures in Exhibit No. 10?

A. These particular pictures?

Q. Yes.

A. Well, they are all different. If I may say, this big sign—

(Testimony of Larry Finley)

Q. Who directed the taking of them?

A. Different people.

Q. Pardon me? [753] A. Different people.

Q. But who directed the taking of those pictures?

A. You mean who instructed them to take them, or who took them?

Q. Who employed the photographer?

A. I think I employed this top one. I employed the top and the bottom one, if I remember right.

Q. And who employed the other two?

A. And the other two, Mr. Austin.

Q. Mr. Austin? A. Yes.

Q. And Mr. Austin is your employee? A. Yes.

Q. You took them for the purpose of bringing them in as evidence in this case, did you not? A. Yes.

Mr. Doherty: Exhibit No. 10, your Honor, is the pictures of the Pacific Square that have been introduced in evidence.

The Court: I remember that.

Q. By Mr. Doherty: You testified yesterday as to Mr. Thayer, the vice-president of this defendant corporation. Did you have any knowledge of that?

A. Mr. Lyle Thayer I was speaking of.

Q. The gentleman that has been in the room, Mr. Thayer, and you said he was a vice-president. [754]

A. I thought he was vice-president.

Q. You have no independent knowledge of that, have you? A. No. I just took it for—

Mr. Doherty: I was going to ask the witness some questions about profits and losses on the operations, but in view of the status of the record, and because the audi-

(Testimony of Larry Finley)

tor is going to come on the stand, could it be understood that if I desire to recall this witness on that phase of the examination, we may do so?

Mr. Christensen: We won't raise any objection if you want to go ahead now. I will not raise any objection.

Mr. Doherty: I don't want to raise those questions with this witness unless—

The Court: I think I understand what you mean. If that is all, only that one subject-matter, that you desire to reserve—

Mr. Doherty: May I ask associate counsel here whether or not I have overlooked anything, your Honor?

The Court: Yes. I think we will take our recess now, ladies and gentlemen. Remember the admonition and keep its terms inviolate.

(A short recess was taken.)

The Court: All present. Proceed.

Mr. Christensen: Mr. Doherty—

Mr. Doherty: I just wanted to ask one more question. [755]

Mr. Christensen: Go right ahead, sir.

Q. By Mr. Doherty: Mr. Finley, you spoke of some trips to New York, one to employ Jimmy Dorsey. Is that correct? A. Yes.

Q. Jimmy Dorsey is represented by the General Amusement Corporation? A. That is correct.

Q. And who is the local representative of the General Amusement Corporation? A. Ralph Wonders.

Q. You found it necessary, even though General Amusement Corporation and your friend, Ralph Won-

(Testimony of Larry Finley)

ders, were representing him, to go to New York and to engage Jimmy Dorsey direct?

A. No, that is not so, Mr. Doherty.

Q. Did you go to New York to engage Jimmy Dorsey? A. I engaged him while I was in New York.

Q. While you were in New York? A. Yes.

Q. You went to New York for other purposes?

A. Other booking purposes, yes.

Q. And not to engage Jimmy Dorsey?

A. Not specifically to engage Jimmy Dorsey, no.

Q. And on that trip you claim you spent something like two or three thousand dollars? [756]

A. I don't think I claimed that, Mr. Doherty.

Q. Or \$1500.00?

A. That is more like it, yes.

Q. Yes, you are correct. I have this one confused with the one for Tommy Dorsey. You went East to see Jimmy Dorsey in March, 1945, and the trip cost you \$1500.00? A. That is correct.

Q. And that is one of the items of damage you are charging here?

A. Yes. The trip was for general booking purposes and to become familiar with the band leaders in New York, to lay the groundwork for direct booking.

Q. In other words, it wasn't just to book a band, the Jimmy Dorsey band, but you went there for general booking purposes and to become better acquainted with the situation in the entertainment field?

A. No, that is not so. I went back for the purpose of booking not only Jimmy Dorsey, but to get acquainted with such people as Sammy Kaye, and other band leaders who were back there, so that I could lay the groundwork

(Testimony of Larry Finley)

for future booking. That was my purpose in going to New York when I booked Jimmy Dorsey.

Q. And that you are claiming as one of the elements of damage here?

A. That was part of my expense in the operation of the [757] ballroom, Mr. Doherty.

Q. Now, about 45 days later you went back to see Tommy Dorsey? A. That is correct.

Q. At that time you had under consideration the arrangement at the Casino at this beach room down here at Ocean Park? A. That is not so.

Q. That is not so? A. That is not so.

Q. It had not come up at that time?

A. No, it had not.

Q. That came up in New York?

A. It came up while I was in New York.

Q. And that prolonged your stay?

A. No, it didn't. It didn't prolong my stay. Both Mr. Eastman and Mr. Michaud came out to the West Coast to consummate that deal.

Q. Now, you spent \$2,000.00 on that trip?

A. I think I spent more than that on that trip. There was quite a bit of entertaining on that trip.

Q. Is that the time you went out to the gambling house and had a big dinner, and so forth? Was that the trip?

A. I can't help myself here. I don't know anything about what you are speaking, Mr. Doherty.

Q. Didn't you tell either Mr. Barnet or Mr. Bishop that [758] on one of your trips to New York they had

(Testimony of Larry Finley)

come and called for you and taken you out to a big gambling house and for dinner?

A. That is the payoff. Yes, I had dinner at a place where there was gambling. However, I am not in the custom of gambling, Mr. Doherty.

Q. Mr. Finley, I don't say that you gambled. I said you went out to a gambling house.

A. I am sorry. I beg your pardon, Mr. Doherty.

Q. You went out there?

A. Yes, I went out there and had dinner.

Q. And there was gambling there?

A. I believe there was. I wasn't in the gambling room, but there was gambling there, I believe.

Q. And you had a big dinner there? A. Yes.

Q. And you paid for it?

A. No, I didn't pay for it?

Q. You did not?

A. No, I didn't pay for that dinner.

Q. What is your transportation from here to New York, Mr. Finley?

A. I don't have any idea. I don't take care of that, Mr. Doherty. My office buys it for me.

Q. And you haven't any idea what it costs to go from here to New York by railroad or air? [759]

A. No, strange enough, I don't, Mr. Doherty. I don't have any idea.

Q. That is clear over your head? A. Yes.

Q. Do you know what your hotel bill was?

A. It was quite high.

Q. What hotel did you stop at?

A. At the Waldorf.

(Testimony of Larry Finley)

Q. And how many rooms did you have?

A. What trip are you speaking of, Mr. Doherty?

Q. We will take the Jimmy Dorsey trip that cost \$1500.00.

A. I had one room on that trip. Oh, I beg your pardon. I was not at the Waldorf on that trip. I was at the St. Moritz, and I paid \$8.80 for a suite, if I recall right.

Q. That was a suite of rooms? A. Yes.

Q. And those were under a ceiling price, relating back to some date in 1945?

Mr. Christensen: That is objected to as calling for his conclusion or opinion.

The Witness: I can answer that, Mr. Christensen, if you want.

The Court: If you insist. I was going to sustain the objection, but if you insist, all right. [760]

The Witness: Well, the St. Moritz is a reputable hotel, and they have the prices posted in the rooms, so I imagine it is the ceiling price.

Q. By Mr. Doherty: How many days did you stay in New York?

A. I don't remember that now. I think I was there about three weeks.

Q. Two weeks?

A. Two or three weeks, I don't recall.

Q. Two or three weeks, and then you came back?

A. Yes.

Q. How long were you there when you went to get Tommy Dorsey?

A. I don't remember the exact number of days; two or three weeks.

(Testimony of Larry Finley)

Q. Where did you stop on that occasion?

A. I had a room at the Waldorf on that occasion. I couldn't get into the St. Moritz. I remember now.

Q. And if you stayed there two weeks, at \$2,000.00, it would be about \$150.00 a day?

A. Yes, that is approximately right, Mr. Doherty.

Q. And if you were there three weeks, about \$100.00 a day?

A. I think that is mathematically correct.

Q. I said about \$100.00 a day? [761]

A. Yes, about.

Q. But you spent more than \$2,000.00?

A. Yes, I think I did. As I said, I had to do an awful lot of entertaining.

Q. You were back there on private business, were you not?

A. I stated the reason for my trip back, Mr. Doherty.

Q. You went down to Washington, didn't you?

A. On the Tommy Dorsey trip, no, I didn't go back to Washington.

Q. On any of those trips did you go to Washington?

A. I was in Washington—I was in Washington the last, not the last trip. I was in Washington about six weeks ago. I spent two days there. It was incidental to my being in the East.

Q. Were you there during the Jimmy Dorsey trip?

A. In Washington? I don't believe I was. No, there was nothing I could do in Washington, so I had no reason to go down there.

Q. Now, respecting the climate in San Diego,—

A. Yes.

(Testimony of Larry Finley)

Q. —there are about 30 or 40 days of fog at Mission Beach and about 90 days in the city of San Diego; is that your estimate?

A. I did not state there were 30 or 40 days fog, Mr. [762] Doherty, please. I said there were 30 or 40 nights when there was fog at Mission Beach. That was my statement.

Q. Yes. And about 90 days or 90 nights, was it, in San Diego?

A. I was advised of that by the United States Weather Bureau at Lindbergh Park, which is about a half mile from Pacific Square, as to that record of 90 days or 90 nights of fog. That is what I had from them down there.

Q. But the number of days at Mission Beach is your own?

A. Remember, we only operated two nights a week.

Q. Yes.

A. Yes, I would say my own estimate, 30 or 40, the estimate of myself plus the people I have working for me.

Q. You have but one lease with the City of San Diego for the Beach?

A. That is correct.

Q. And that calls for the ballroom and the concessions?

A. Yes.

Q. Is that right?

A. Yes.

Q. You made a statement here this morning that your loss to December 31st on the ballroom was \$122,000.00?

A. Approximately that much, yes.

Q. And what was your profit on the concessions?

A. I don't recall. I could tell you approximately. [763] If I may see the statement, I can give you the exact figure, but it was quite profitable.

(Testimony of Larry Finley)

Q. Quite profitable?

A. It was in excess of \$100,000.00.

Q. You built the concessions to feed the ballroom, and built the ballroom to feed the concessions, didn't you?

A. That is your statement, Mr. Doherty.

Q. What would be yours, under those circumstances?

A. The ballroom is an independent operation of Mission Beach Amusement Park. There is a skating rink there. And that is an independent operation of Mission Beach Amusement Park. The Amusement Park itself is independent. It is broken up into three things, the skating rink, the ballroom, the park. The park—the revenue from the park could not go into the ballroom, and the revenue from the ballroom could not go into the park. Our park revenue is taken from the rentals, from the flats and percentages we have received from the concessionaires. The ballroom revenue is taken from the amount of money that is brought into the box office. They are two separate operations.

Q. Now, let me see if we understand each other, Mr. Finley. Is it to the interests of the ballroom to have large crowds out in the park?

A. Not necessarily, Mr. Doherty. We have had large crowds at the park with bad music inside, and we have done no [764] business.

Q. Well, is it to the interests of the concessions to have large crowds in the ballroom? A. Yes.

Q. Then the ballroom does feed the concessions?

A. I don't see that you can say it feeds it. The nights that the ballroom is closed there are still a lot of people in the park, and on Sunday afternoons the ballroom is not open and we are very busy in the park.

(Testimony of Larry Finley)

Q. Well, doesn't the attendance in the ballroom itself, those who go there, patronize the concessions?

A. Yes ,they do.

Q. And when you have a large crowd at the ballroom, that means you have a larger crowd than otherwise would be the case at the concessions?

A. That definitely would be the case.

Q. So that the ballroom does help to feed the concessions?

A. Yes, it does.

Q. Now, do you think that the concessions crowd, the park crowd, does not help to feed the ballroom?

A. No, I don't think it does, Mr. Doherty. That was proven by our operation. I speak from experience.

Q. In other words, from your operation of the enterprise, the way the concessions were operating, it does not help the [765] ballroom?

A. I stated before dancing is more or less a habit with some people, and if they go in the ballroom, if they go out during the intermission they will spend some money at the concessions, but if people go out to the park in bathing suits or in slacks to play fun games, or families go to the beach or park with their kiddies, they don't go in the ballroom. That is the way it works.

Mr. Doherty: I think that is all of this witness.

Q. By Mr. Doherty: Oh, just for accounting purposes, you keep the ballroom separate from the concessions?

A. How do you mean, just for accounting purposes, Mr. Doherty?

(Testimony of Larry Finley)

Q. You tabulate the income into the ballroom, and then you make certain charges against that operation?

A. I am sorry, you would have to ask my auditor about that. He is here. I am really not able to answer that question.

Q. Does the auditor keep your accounts?

A. No, we have bookkeepers to do that, but I have one auditor to supervise all of my activities for me.

Q. Whatever comes in at the ballroom or at the concessions is the money for yourself and Mrs. Finley, isn't it?

A. I am sorry, I don't understand that question, Mr. Doherty. [766]

Q. Whatever comes in in the way of cash, or other things of value—

A. Yes.

Q. Whether from the ballroom or the concessions, is the property of you and Mrs. Finley?

A. I don't understand that question. I am sorry. What do you mean by "things of value"?

Q. Has any one else any interest in it?

A. No, Mrs. Finley and myself are sole partners.

Q. And everything that is taken in there is the property of yourself and Mrs. Finley, after the debts are paid?

A. It is the property of Larry Finley and Associates. That is Mrs. Finley and myself, a co-partnership. That is right.

Q. Larry Finley and Associates is just merely the name under which you and Mrs. Finley operate?

A. And the name my employees work under, too.

(Testimony of Larry Finley)

Q. Have your employees any interest in your Beach concessions down there?

A. No, they don't, but my employees are termed associates instead of employees. Psychologically, it works out very good for them.

Q. Just psychologically? A. Yes.

Mr. Doherty: That is all. [767]

Re-Direct Examination

By Mr. Christensen:

Q. Mr. Finley, I am not quite clear on this paragraph in Defendants' Exhibit Q, which reads as follows:

"I am sure that the Curt Sykes orchestra would have been a good suggestion for you for Radcliffe's; however, I understand that this booking has been filled."

Mr. Howard talked to you about Curt Sykes?

A. I talked to Mr. Howard about Curt Sykes. I had a band down there, Anson Weeks at the Trianon, and most of the boys in the band were comprised of Curt Sykes members, and Curt was down himself for a week or ten days—can you hear me—most of the boys down there were members, and Mr. Sykes was down there for a week or ten days and I got to know him.

Mr. Doherty: Could I have the question read to which this statement is an answer?

(The question and answer were read.)

Mr. Doherty: That is calling for a conversation between him and Mr. Howard.

(Testimony of Larry Finley)

The Court: Well, I understood counsel's question to ask him to explain that excerpt from the letter that you introduced in evidence.

Mr. Christensen: If that wasn't clear in my question, that is what I want. [768]

The Court: You didn't propound an interrogation. You just said you didn't understand it. I think you had in mind having him clarify it, and you should have interrogated him by a direct question, and then we would have avoided all this loss of time.

The Witness: Shall I go ahead, your Honor?

The Court: I think so.

The Witness: When I talked to Hal Howard I told him I had received a letter from Curt Sykes showing me he was finally getting out of his contract with M. C. A., and he wanted to work for me again at the Trianon Ballroom, or the Radcliffe, as it was known at the time, and I told Hal Curt was a good boy and I would like to see something done for him. He said, "Why don't you use him yourself?" And that was the sum and substance of the conversation, but my conversation with Howard was to the effect that Sykes was trying to get out of his M. C. A. contract, and was finally getting out of it.

Mr. Christensen: I see. That is all. You may step down, sir.

(Witness excused.)

Mr. Christensen: Jack Ostrow.

JACK MARVIN OSTROW,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows: [769]

Direct Examination

The Clerk: Will you state your name, please?

The Witness: Jack Marvin Ostrow.

By Mr. Christensen:

Q. Mr. Ostrow, are you a certified public accountant?

A. Yes, I am.

Q. Your office is located where, sir?

A. In Los Angeles, on Hollywood Boulevard.

Q. You know Mr. Finley who was just on the stand?

A. Yes, I do.

Q. Were you employed by him in your capacity as a certified public accountant? A. I was.

Q. When?

A. Well, I still am. I would like to correct that. I still am.

Q. When were you first?

A. Well, when Mr. Finley returned from New York in, I guess it was August or September, 1944; although I had known him previously and had done some work for him while I was connected with a former firm by whom I was employed.

Q. Did you do some work for him at the Mission Beach Amusement Center, that enterprise?

A. Yes, I did. I started at the time that Mr. Finley got the lease at Mission Beach. [770]

Q. And what did you do?

A. Well, at the beginning I helped install the system of records to be kept at Mission Beach, and supervised

(Testimony of Jack Marvin Ostrow)

the keeping of those records by the bookkeeper; made routine trips down there to help discuss their problems in keeping the records, helping the bookkeeper, and doing the regular auditing, and I rendered statements, I believe, until July or August of 1945 from the date of the inception.

Q. Those books were then kept under your supervision, were they?

A. Yes, they were kept under my supervision, but I was completely an outside auditor, yes.

Q. What did the books consist of?

A. Well, there was the original records of receipts to the various concessionaires, and box office reports from the cashiers. From there they were entered into the usual journals, the cash receipts, disbursements, invoice and general journal, and carried up on through the general ledger, to reflect the various activities that the park was engaged in and the volume done.

Q. In auditing those books, what did you do to check the validity of all the entries, sir, if you did anything?

A. Well, the accepted auditing standards, with particular emphasis there on the receipts from the various sources, because the City leases provided for a rental based on percentage, which [771] required a monthly certification to the City of San Diego of the gross receipts, and I had to certify to those reports, as well as making the adjusted entries and checking the invoices, and so forth, to substantiate the various expenditures.

(Testimony of Jack Marvin Ostrow)

Q. Did you make and deliver to Mr. Finley quarterly statements?

A. At Mission Beach, I believe during the period that I was employed I rendered a statement as of February 28, which was the end of the fiscal year.

Q. May I interrupt you at this time and ask you to examine Exhibit 12-A, for identification, and ask you if that is the report to which you have just made reference, sir? Take your time and be sure that it is.

A. Yes, this is the report.

Q. And from what source did you get the figures which are there reflected?

A. From the general ledger and other substantiating records of the Mission Beach Amusement Park, operated by Larry Finley and Associates.

Q. Does that exhibit which you now have in your hands fairly and truly reflect the statement as it existed on, or at the close of business on February 28, 1945?

A. Yes, in my opinion, it does.

Mr. Christensen: May I offer this one in evidence at this time, your Honor? [772]

Mr. Doherty: Subject to the objection I heretofore made, your Honor, that as to these defendants it is incompetent, irrelevant and immaterial, and not within the issues of the case, not a type of evidence that is admissible in this type of case to establish a measure of damages; no foundation laid, and no showing of conspiracy or combination.

The Court: Read the last statement of counsel, please.

(The statement was read.)

Mr. Doherty: May I add also to that that, and this is from what my associates tell me, at the pre-trial hear-

(Testimony of Jack Marvin Ostrow)

ing there was no contention made, in fact the very opposite, that this type of evidence was the measure of damages; that the measure of damages at the pre-trial hearing was on the basis of loss of prospective profits.

The Court: Of course, that may be true, and yet that would be no ground to exclude a financial report. The court will be required to state the rule concerning the measure of damages at the appropriate time. That is not this time. I am not indicating anything concerning the value or weight of this evidence, ladies and gentlemen, but it is competent evidence to be received, and the objection, therefore, is overruled.

(The document referred to was marked Plaintiff's Exhibit No. 12-A, and was received in evidence.)

Q. By Mr. Christensen: Mr. Ostrow, did you prepare a [773] report as of the close of business of May 31, 1945, covering the Mission Beach Amusement Center?

A. Yes, I did.

Q. Will you please look at Exhibit 12-B, for identification, and tell me if that is the report which you furnished?

A. Yes, it is.

Q. Does that fairly and truly represent the accounts and matters and things therein set forth?

A. Yes, in my opinion it does.

Mr. Christensen: I offer this as of the exhibit next in order, and ask it be known as 12-B in evidence.

Mr. Doherty: The same objection, your Honor.

The Court: The same ruling.

(The document referred to was marked Plaintiff's Exhibit No. 112-B, and was received in evidence.)

(Testimony of Jack Marvin Ostrow)

Q. By Mr. Christensen: Did you likewise prepare a report, a financial statement, as of the close of business of July 31, 1945, sir?

A. Yes, I did, but I believe I had rendered one on June 30th, too, as I remember it.

Q. Maybe you did, sir. Will you bear with me just a moment? Do you have there a copy? I beg your pardon. It has been furnished to me here. This looks like the copy.

Mr. Christensen: Mr. Doherty, I will be glad to have you [774] inspect it.

Q. By Mr. Christensen: (Continuing) You have told me that you prepared a financial statement as of the close of business of June 30th, 1945. Please look at this document, which has not heretofore been marked, and tell me if that is the statement which you have just referred. [775] A. Yes, it is.

Q. And is that a true and correct report of the financial matters therein reflected? A. I think it is.

Mr. Christensen: May this be received into evidence and marked as the last number on—

The Clerk: That will be 12-G.

Mr. Christensen: 12-G, your Honor?

The Court: What period is covered by that?

Mr. Christensen: It is entitled "As of June 30." But the witness, I think, could better answer the question.

The Witness: It covers the period of operations for the month of June and for the period March 1, 1945 through June 30, 1945.

The Court: It may be so marked.

Mr. Christensen: 12-G.

Mr. Doherty: The same objection.

(Testimony of Jack Marvin Ostrow)

The Court: The same ruling. Of course, I am assuming that you have here available for inspection to your opponents the supporting documents of these financial statements.

Mr. Christensen: I will have them here in the morning. The bookkeeper would not come up on the airplane this afternoon and is driving up, and I think that at noon-time she will be here.

(The document referred to was marked as Plaintiff's Exhibit 12-G and was received in evidence.) [776]

The Court: Before I would permit them to be used before the jury, I want those here so the other side can go into them fully if they desire.

Mr. Christensen: They are on their way, your Honor; and I regret that she would not fly up with them. She insisted upon driving. They will be here the first thing in the morning.

The Court: You understand the ruling, now, do you, gentlemen, that these matters will not go before the jury until such time as the supporting documents are available in the courtroom for your inspection and for a thorough examination by either yourselves, assisted with such auditing force as you desire to examine them.

Mr. Doherty: That would mean as to the "courtroom", your Honor, also the clerk's office, from the standpoint of convenience?

The Court: Oh, yes. I think we can arrange that by stipulation.

(Testimony of Jack Marvin Ostrow)

Mr. Christensen: I am sure Mr. Doherty and I can get together on that.

The Court: They will all be in the custody of the court, subject to the examination of both sides until this case is concluded, and none of these financial statements or auditors' reports will be received into evidence, technically, so that the jury may consider them or so that any argument may be [777] made concerning them until such time as the supporting physical documentary evidence is before the court for inspection by both sides.

Mr. Christensen: I understand that.

May I proceed, then?

The Court: Yes; you may.

Q. By Mr. Christensen: Did you likewise prepare a financial statement as of the close of business of July 31, 1945, sir? A. Yes; I did.

Q. Please look at Exhibit 12-C for identification and tell me if that is the document to which you have just referred? A. Yes; I believe it is.

Mr. Christensen: May it be received under the same understanding, as our Exhibit 12-C?

Mr. Doherty: The same objection.

The Court: The same ruling, with the same reservation.

(The document referred to, heretofore marked as Plaintiff's Exhibit 12-C, for identification, was received in evidence.)

(Testimony of Jack Marvin Ostrow)

Q. By Mr. Christensen: You did not render a statement thereafter? I see these bear the name of Mr.—

A. No; I did not render them.

Q. Hansen and Hallowell? [778]

A. Yes.

Mr. Christensen: You may examine, Mr. Doherty. I have Mr. Hansen here and will introduce these others in just a moment.

Mr. Doherty: It would save time, your Honor, if I examined him after we had a chance to look at the records.

The Court: Yes, indeed. You may defer your cross examination until later.

Mr. Christensen: I take it, then, that he may step down, but he should remain here subject to call; am I correct, sir?

The Court: That is correct.

Mr. Christensen: You understand that. Mr. Hansen please.

Your Honor, counsel and I agree that he may go. Mr. Ostrow, you may leave now, but you will report here the first thing in the morning, say by ten o'clock. I mis-spoke myself. 10:30, isn't that correct, tomorrow morning?

The Court: Yes. We have the empanelment of the Grand Jury at 9:30.

Mr. Christensen: 10:30.

EUGENE A. HANSEN,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows: [779]

Direct Examination

By Mr. Christensen:

Q. Your name, sir, is? A. Eugene A. Hansen.

Q. Mr. Hansen, you are a public accountant, are you not, sir? A. Yes.

Q. And you have and now are employed by Mr. Finley in that capacity, that is to say, as public accountant?

A. That is right.

Q. And as such are you acquainted with the books and records of the Mission Beach Amusement Center?

A. Yes, sir.

Q. And are they kept there under your direction and supervision? A. Yes.

Q. And have been, I believe, since—will you state the date?

A. I rendered the first operating statement for the month of August.

Q. August of 1945, sir?

A. That is right. Then there was two—one rendered for two months.

Q. I beg your pardon?

A. September and October was rendered as one statement. [780]

Q. Well, I have one as of September 30, 1945.

A. That is right.

Q. One as of October 31, 1945? A. That is right.

(Testimony of Eugene A. Hansen)

Q. And one as of December 31, 1945?

A. That is right.

Q. Is there another one?

A. No; that is right. August and September are combined.

Q. Oh, those two are in there. I beg your pardon. I did not understand correctly what you said. Mr. Hansen, I hand you here Exhibit 12-D for identification, which appears to be a statement of financial condition, Mission Beach Amusement Park, as of September 30, 1945. Please examine that and see if that is the document to which you have just referred?

A. Yes, sir.

Q. Does this truly and fairly represent the matters and things therein reflected?

A. Yes.

Mr. Christensen: Under this same understanding, as our Exhibit 12-D into evidence.

Mr. Doherty: The same objection.

The Court: The same ruling, with the same reservation.

(The document referred to was marked as Plaintiff's Exhibit No. 12-D and was received in evidence.) [781]

Q. By Mr. Christensen: I hand you here Exhibit 12-E for identification, which appears to be a statement of financial condition as of October 31, 1945. Please examine that and tell me if you prepared that, sir?

A. Yes.

Q. And does that, too, truly reflect the matters and things reflected and therein set forth?

A. Yes.

Mr. Christensen: Under the same understanding, as our Exhibit 12-E into evidence.

(Testimony of Eugene A. Hansen)

Mr. Doherty: The same objection.

The Court: The same ruling, with the same reservation.

(The document referred to was marked as Plaintiff's Exhibit 12-E, and was received in evidence.)

Q. By Mr. Christensen: Did you likewise prepare a statement of the financial condition of Mission Beach Amusement Park as of December 31, 1945, sir?

A. Yes; I did.

Q. Will you please examine this document which has heretofore been marked as Exhibit 12-F, for identification, and tell me if that is the exhibit to which you refer?

A. Yes.

Q. Is that, too, a true and accurate report?

A. Yes, sir.

Mr. Christensen: Under the same understanding and agree- [782] ment, as our exhibit 12-F into evidence, your Honor.

Mr. Doherty: The same objection.

The Court: The same ruling, with the same reservation.

Mr. Christensen: That is all I wanted to ask Mr. Hansen. And may we have the same agreement that he may leave now and return at shortly before 10:30 o'clock tomorrow morning for your examination, after the books and records have been made available to you?

Mr. Doherty: What time will the books be here tomorrow?

Mr. Christensen: Mr. Doherty, would you permit me to call you at your office after we adjourn, when I can

(Testimony of Eugene A. Hansen)

make a more accurate check, except I can only tell you I am advised they are on their way, and that she would not take a plane and insisted upon driving?

Mr. Doherty: Call Mr. Warne, if I would not be in.

Mr. Christensen: Or I may have Mr. Jaffe call you.

You may be excused, then, Mr. Hansen, until 10:30 tomorrow morning.

(The document referred to was marked as Plaintiff's Exhibit 12-F, and was received in evidence.)

Your Honor, that was agreeable with you, was it not?

The Court: Yes; that is satisfactory.

Mr. Christensen: Mr. Stutz, please. [783]

WALTER R. STUTZ,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name.

The Witness: Walter R. Stutz.

Direct Examination

By Mr. Christensen:

Q. Mr. Stutz, you are the Walter Stutz that is now connected, in some capacity at least, with the Pacific Square ballroom of the City of San Diego, are you not?

A. That is correct.

Q. What is your capacity there, sir?

A. I am the general partner.

Q. And who is the other partner?

A. There are four limited partners.

(Testimony of Walter R. Stutz)

Q. Will you state the names, sir?

A. Lillian Hiestand, Lewis Stutz, Sam Stutz, and the next you will have to help me with. It is an estate; it is Bernice Gantert, and it is in the process of probate.

Q. Could you spell that at least phonetically, please?

A. G-a-n-t-e-r-t.

Q. Does anyone else have any interest whatsoever in that ballroom? A. No. [784]

Q. When did you acquire it, sir?

A. July the 1st, 1945.

Q. Since that time has Mr. Dailard been connected with that in any capacity? A. None.

Q. Has he not assisted you in the booking of bands?

A. Not in the booking of bands; no.

Q. In any way?

A. In no way has he assisted me. We have discussed policy, and I haven't seen Mr. Dailard, I don't believe, over two times, two or three times until this trial.

Q. You have brought, pursuant to my request, a profit and loss statement, or financial statement?

A. That is correct.

Q. Covering your operation of the Pacific Square for the period July 1 to December 31, 1945, sir?

A. Yes; I did.

Q. Let me have it.

A. Do you have the letter there?

Mr. Christensen: No, sir; I do not.

A. Here is the original copy here, the original letter from my auditor.

Mr. Doherty: May I ask the witness a question?

Mr. Christensen: Why, yes, sir.

(Testimony of Walter R. Stutz)

Mr. Doherty: Have you carbon copies of what you just [785] gave him?

The Witness: Yes.

Mr. Doherty: May I have them, please?

The Witness: Yes.

Q. By Mr. Christensen: The letter which you handed me appears to be on the stationery of your accountants and auditors, Messrs.—will you pronounce it?

A. Fibiger-Warren & Company.

Q. They appear to be located in the San Diego Trust & Savings Building in the City of San Diego?

A. That is correct.

Q. So that you will not need to leave this letter, it advised you that they had not audited these statements due to income tax pressure in their office at the present time. However, the figures for this report were filed from monthly totals as shown by books of account which appear to be in order. I correctly read that, did I, sir?

A. That is correct.

Q. Did you ever operate the ballroom, or any ballroom, prior to July 1, 1945, sir? A. No.

Q. Prior to that time you had the liquor concession at the Pacific Square ballroom, did you not, sir?

A. That is an outside concession. Yes.

Q. It is located in the Pacific Square ballroom, however? [786]

A. No; it is a separate building located on the property that Pacific Square is located on, but not in the ballroom.

Q. It is part of the same building, isn't it?

A. No; it is a separate building.

(Testimony of Walter R. Stutz)

Q. Who operates the concessions there in the ballroom at this time?

A. The Pacific Square Amusement Company.

Q. And you keep your receipts derived from the concessions separately from that of the ballroom generally, is that right?

A. It appears to have been picked up in that way by the auditor, yes. There are separate revenue positions, and the totals are picked up that way.

Q. And who advised you to make the statement or have that statement made in this fashion, Mr. Stutz?

A. To have it made in what fashion?

Q. Oh, showing your concessions operations separate from the ballroom operations?

A. Well, nobody advised me as to that. I asked Mr. Fibiger to give me the breakdown of the ballroom, the box-office, the checkroom, and the soda fountain.

Q. Are there any other concessions there, sir?

A. That is all.

Q. From this statement it appears that your total receipts from the ballroom proper, excluding the concessions, [787] was \$181,911.18; is that correct, sir?

A. Including the rental income; that is right. 181—that is right.

Q. Now, against that you have charged expenses totaling \$194,154.61; is that correct, sir?

A. That is correct.

Q. And, for or from your concessions, you show a total concession profit of \$20,175.60?

A. Well, with this addition—

Q. Oh, yes? A. —\$20,269.39

(Testimony of Walter R. Stutz)

Q. I see. A. That is correct.

Mr. Christensen: All right. Thank you very much, Mr. Stutz. May we have this marked for identification at this time?

The Witness: Yes.

Mr. Christensen: For identification, our Exhibit will be 13.

The Clerk: Plaintiff's Exhibit 13 for identification.

(The document referred to was marked as Plaintiff's Exhibit 13 for identification.)

Mr. Christensen: Thank you.

Mr. Doherty: May I ask counsel why it should not be introduced into evidence, because, as for identification, it is not [788] in evidence and there will be no other witness who can introduce it into evidence who will lay any foundation excepting this witness, unless you bring in an accountant.

The Court: You should not ask him to introduce anything. Let him try his own case.

Cross Examination

By Mr. Doherty:

Q. Mr. Stutz, have you any other business activities or concerns other than the Pacific Square ballroom?

A. Yes, sir.

Q. Where is it located?

A. I have a number of activities in San Diego, the Walter R. Stutz Enterprises, which is an operating partnership, operates a chain of cocktail bars, gift shops, off sale liquor stores, and an arcade.

(Testimony of Walter R. Stutz)

Q. And this is just one of your activities?

A. That is just one.

Q. And from July 1, 1945 to December 31, 1945, you showed a net loss of operating the ballroom of \$12,243.43?

A. That is for the ballroom operation; that is correct.

Q. And during that period of time did you have what is known and described here as name bands operating at Pacific Square?

A. That is correct.

Mr. Doherty: That is all. [789]

Redirect Examination

By Mr. Christensen:

Q. How many name bands were submitted to you by Music Corporation of America between July 1, 1945 and December 31, 1945?

A. Well, we run on a three-night week, operating Friday, Saturday and Sunday, and the submissions, as a matter of fact, or bookings, I would say, and including 26 weekends, there would be 26 submissions, together with others that I discarded.

Q. Did you use any bands from any other agency other than M.C.A.?

A. Yes; there was Ault in August.

Q. Other than Georgie Ault, anyone else?

A. There was a Del Courtney booking.

Q. I beg your pardon, sir?

A. Del Courtney, which is a band booked.

Q. He has not played yet?

A. He has not played; he is booked.

Q. How far ahead are you booked now with bands?

A. We run spot booked into March, the latter part of March, and I think there is a few in April.

(Testimony of Walter R. Stutz)

Q. Mr. Bishop does the booking for you, does he?

A. Mr. Bishop of M.C.A.

Q. Yes?[790]

A. He assists with the submissions and I confirm the bookings; yes, sir.

Q. You bought Georgie Ault through Bishop, didn't you?

A. I believe that submission came through; yes.

Q. And Del Courtney, also; that is right, isn't it?

A. Yes; I think that was submitted and approved by myself.

Q. And Mr. Dailard has been assisting you and advising you in your band selections, hasn't he?

A. No. Mr. Dailard and I, I don't believe have seen one another over two or three times since I acquired the Square. Mr. Dailard spends considerable time in Los Angeles and I haven't had the opportunity to visit with him.

Mr. Doherty: Just one question or series of questions, your Honor, I forgot to ask this gentleman. I don't know whether he can answer them or not.

Recross Examination

By Mr. Doherty:

Q. How long have you lived in San Diego?

A. Since 1916.

Q. Were you there during this so-called boom period, when the soldiers and sailors were there in the vicinity?

A. I have operated all through that period.

Q. Have you operated, been in business since that time, continuously? [791]

A. Continuously.

(Testimony of Walter R. Stutz)

Q. You had at one time an interest, did you not, with Mr. Dailard in the Pacific Square?

A. That is correct.

Q. And you sold your interest to him?

A. That is right.

Q. Have you observed during the period since the Japanese surrendered any trends respecting attendance at places of amusement that you know about in San Diego?

A. Yes. The overall picture in San Diego on what we call business, where there would be attendance, the gross is off about 35 or 40 per cent. Some places are affected 25, some 40. My houses are off at least 25 to 30 per cent.

Q. Before the Japanese surrendered did you have a great number of servicemen in that area that were headed for overseas?

A. Yes.

Q. And since that time have you had a great number who have come through San Diego on their return from overseas?

A. There has been considerable come through; yes.

Q. Have you had an opportunity to observe their tendency as to spending money and things of that sort, between those who were going overseas and those who have returned?

A. Yes. Those that were going overseas and all during this period from '41, '2 and '3 that I have operated through, had a feeling that they were going to be shipped out, or they [792] are on call, they are going to die tomorrow, anyhow; and they spend their money much more freely, far more freely than those who are returning. That has affected my receipts all over, in all my places.

(Testimony of Walter R. Stutz)

Q. Have you noticed any change in their attitude respecting behavior between those that were going out overseas before the Japanese surrendered and those who have returned? When I say "those who have returned" I mean the veterans?

A. well, those that were going out had just kind of a "devil-may-care" attitude as a whole; and those that are returning, outside of some cases that we call psycho—I mean we have just given that name, I will say, down there amongst the operators in the amusement field particularly—they are of a little solid thinking; they have adjusted themselves to returning to their civilian life. And there seems to be a marked distinction of the two, those going and those returning, outside of those few spotted cases.

Mr. Doherty: That is all.

Redirect Examination

By Mr. Christensen:

Q. You never really got very close to servicemen, did you?

A. Myself?

Q. Yes.

A. Well, I am the largest operator in San Diego in the [793] liquor business, and I live in my places 24 hours a day. I police all my floors, and I can be found in one of them from the time I go to my office and do my daylight work, from 5:30 to 6:00 o'clock, on into the evening, I will be at one of my places until one o'clock at night, and that keeps me in touch with them very close.

Q. And occasionally there is some sailor, soldier or marine who does not spend all his time in a liquor place, isn't there.

A. Oh, quite certainly, quite definitely.

(Testimony of Walter R. Stutz)

Q. Mr. Stutz, didn't you know from your own experience with these servicemen, that before they went overseas they were building up their insurance and they had thoughts on that and taking care of their families, and that after they came back they were thankful that they were alive and having a grand time; don't you know that?

A. That is not true. I have stated the true facts of San Diego.

Q. That is all. That is all. You never were in any branch of the Armed Forces of the United States or any other country, were you?

A. No; I was not. I was too old.

Mr. Christensen: Thank you, that is all.

Your Honor, I have no further witnesses available.

The Court: The only other witnesses will be those [794] auditors in the morning?

Mr. Christensen: That is right, your Honor.

The Court: I think we will recess now, then.

Ladies and gentlemen, we have some work here that will occupy the attention of the court until about 10:30 tomorrow morning, so that if you will be here at 10:30 sharp, please, we will take a recess until that time. Remember the admonition in the meantime.

(Whereupon, a recess was taken until 10:30 o'clock a. m., Wednesday, February 6, 1946.) [795]

Los Angeles, California, Wednesday, February 6, 1946,
10:30 a. m.

The Court: All present. Proceed.

Mr. Doherty: If the court please, Mr. Clore Warne, attorney in this case, has prepared formal objections to the introduction of certain records in written form. May I hand a copy to your Honor?

The Court: Yes. Will you submit it to the other side, also?

Mr. Doherty: And a copy to the clerk, and a copy to the reporter, and a copy to Mr. Christensen.

Without the necessity of reading them into the record, may they be deemed to have been made in open court, and copied into the record, and your Honor made a ruling upon them? I only suggest that as a matter of saving time, if they may be deemed to have been read by your Honor and presented to the court.

The Court: Yes. Let me read them first.

That suggestion is satisfactory. That is satisfactory, Major.

Mr. Doherty: Yes, your Honor. And the objections deemed to have been made as presented in the written statement and may be deemed to have been ruled upon as you have already ruled upon the other matters, that is, objection is overruled?

The Court: The rulings that have heretofore been made [797] will remain in the record.

Mr. Doherty: Yes, your Honor.

The Court: As they have been heretofore announced.

Mr. Doherty: And your Honor is making the same ruling on these new objections as prepared by Mr. Warne?

The Court: I will consider that later.

(The document referred to was in words and figures as follows:)

“Defendants and each of them object to such evidence upon the grounds:

“1) That such evidence does not go to prove any element of damage recoverable or which can be considered by the jury under the facts proven in this case.

“2) That such evidence does not prove or attempt to prove any allegation or claim of damage asserted and set forth in plaintiff’s complaint.

“3) That said evidence is directly at variance with the basis asserted as a claim for damages in plaintiff’s complaint, and that asserted by way of statement by his counsel on the pre-trial hearing in this action and as asserted and claimed in his answer to Interrogatory XXVI heretofore propounded.

“4) It appears affirmatively that at the time the complaint was filed plaintiff had not suffered [798] any damage whatsoever and that it appears affirmatively and without contradiction.

“5) That said evidence does not prove or tend to prove the cause of action asserted and set forth in the complaint in that said complaint is premised upon a theory of a consummated wrong with damages accrued and that evidence of such damage must be as of the date the claim was asserted, to wit, the date of the filing of the complaint.

“(See particularly in support of this point decision and opinion in the case of Connecticut Importing Co. v. Frankfort Distillers. 101 F. (2d) 79, (2CCA, 1939).

“There is no foundation laid for said evidence in that there is no showing of any casual connection between any item of loss claimed to have been suffered and any acts or conduct upon the part of the defendants.

“6) That it appears that the figures and amounts offered by way of proof show a total claim on behalf of the plaintiff, Larry Finley, when it appears affirmatively and without contradiction that the business conducted and operated and as to which said loss is alleged to have been suffered was a co-partnership, an entity unto itself, and that the [799] partnership does not appear as a party plaintiff and that plaintiff cannot assert said claim in his own name on behalf of said partnership.

“7) That said evidence is incompetent, irrelevant and immaterial and not within the issue presented by the pleadings in said case and the claim made and asserted by said plaintiff.

“Frank P. Doherty

Harold F. Collins

Pacht, Pelton, Warne, Ross & Bernhard

“By Clore Warne

Attorneys for Defendants”

Mr. Doherty: Your Honor, I would like to have read into the record—I could call Mr. Finley on the matter, but I think probably counsel and I can agree, with your Honor’s consent to read the Interrogatories numbered XXVI and the answers to the interrogatories rather than calling Mr. Finley.

Mr. Christensen: Oh, yes.

Mr. Doherty: Because I deem it will be agreed that the interrogatories were asked of Mr. Finley and the answers contained were those of Mr. Finley.

Mr. Christensen: Yes, Mr. Doherty.

Mr. Doherty: Interrogatory No. XXVI: Questions by Mr. Warne and answers by Mr. Finley. [800]

"Question A: Does the plaintiff assert as a fact that he has suffered actual damages in the sum of \$1,000,000?

"Answer: Yes.

"Question C: State what elements constitute the damages plaintiff claims to have suffered and sustained, and upon what facts said claims are made and based.

"Answer: By obtaining proper bands for the park, I estimate that my profits should be in the neighborhood of \$350,000 a year, which not only includes profit from the ballroom but also revenue from the rest of the amusement park which is entirely under my control. As was evidenced by the Tommy Dorsey engagement, the revenue throughout the entire park was considerably increased when I was able to bring larger crowds to the ballroom. Better bands would result not only in bigger percentages from the concessionaires, but would enable me to receive greater rentals from concessionaires, as the ballroom is the principal attraction to the amusement park."

Mr. Christensen: It says: "to an amusement park," sir.

Mr. Warne: Correct. [801]

Mr. Doherty: I will read the last line again, Mr. Reporter.

"as the ballroom is the principal attraction to an amusement park.

"Question D: Does plaintiff claim or assert any loss of profits as an element of damage so suffered; and if so, in what dollar amount?

“Answer: Yes; \$350,000 a year.

“Question G: Does plaintiff assert any amount of damages after the date of the filing of the complaint in this action; and if so, in what dollar amount?

“Answer: Yes; the greater portion of the damages claimed, spread over the period of any three-year lease.”

[802]

Mr. Warne: May it be shown further that those interrogatories were prepared and filed as of the 27th day of September, 1945, that being the date that they bear?

Mr. Christensen: That is right.

The Court: So that the jury will understand these features of evidence that are being offered, in cases of this type, ladies and gentlemen, the litigants, the parties to the suit, have a right to propound to each other or to one another, as the case may be, interrogatories, and the person so questioned is required to answer such interrogatories as the court orders to be answered, or if there be no objection interposed by the person questioned or the entity questioned, then the entity or the person answers those interrogatories, and those answers are filed in court together with the interrogatories. That is just what occurred in this case, and those that have been read were taken and occurred pursuant to that regulation, and you will consider that as evidence in the case. The weight of it, of course,—the value or weight of it is for you and not for the judge.

Proceed.

Mr. Doherty: I believe Mr. Ostrow was to take the stand for cross examination. [803]

JACK MARVIN OSTROW,

called as a witness by and on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-Examination

Mr. Doherty: For the purpose of the record, your Honor, at approximately 10:00 o'clock the books of Mr. Finley from San Diego were brought to the clerk's office. The conversations were between Mr. Christensen and Mr. Warne. I don't know what time they arrived, but they were in the clerk's office at about 10:00 o'clock and are now being checked by our auditors.

The Court: Very well.

By Mr. Doherty:

Q. Mr. Ostrow, do you have your office in Los Angeles? A.: Yes, I do.

Q. The business that you do for Mr. Finley in San Diego, is that work done by you in San Diego?

A. Yes, it is.

Q. You make a trip down there and check the records?

A. That's right. I spend—I have made trips there every few weeks, spending anywhere from two to five days in San Diego auditing the records.

Q. Two to five days each trip?

A. Each trip, yes. [804]

Q. How much time did you spend in San Diego in connection with the work you did for Mr. Finley on his

(Testimony of Jack Marvin Ostrow)

books between January 1, 1945, and the completion of your report as of July 31, 1945?

A. Well, that would be a little hard to say because there were probably about eight trips or more during that period. I would have to recheck my records of time to see when I was there and how long I spent each trip.

Q. Give me an approximation, please. I am not going to try to check up on it, Mr. Ostrow, and your approximation will be satisfactory. That is a period of seven months.

A. Seven months. I would say I spent about 30 to 35 working days there.

Q. Did you have any—

A. And I had some assistants with me I think on two of those trips.

Q. That is assistants from your Los Angeles office?

A. From my Los Angeles office, yes.

Q. You found it necessary, did you, to set up a complete set of books?

A. Yes, it was a new enterprise and we had to keep records because of the satisfaction of the City lease, particularly of the receipts, so we set up a complete set of records.

Q. Were you at the same time setting up any records in [805] connection with the Trianon operation?

A. No, those records were set up by a local San Diego man. However, I did subsequently take over the auditing of those, of the Trianon ballroom.

Q. Some of your time in San Diego, then, was spent in connection with the Trianon records?

A. Yes, it was.

(Testimony of Jack Marvin Ostrow)

Q. Did you employ any of the staff that was working upon Mr. Finley's books, that is, those that did the actual signing of the checks and making of the vouchers and the entries in the books?

A. You mean, did I hire them?

Q. Yes. A. No, I did not

Q. They were people that were hired by Mr. Finley?

A. Or his office down there, yes.

Q. Yes. Did you, or your assistant from your office, make the entries in the various books that were kept for the so-called Mission Beach operation?

A. As a usual practice, no. However, on one or two occasions, when they were behind, my assistant and I did help them in the posting of the general ledger.

Q. Did you take the records as they appeared on the face of the books as the basis of your audits that have been introduced here in evidence? In other words, did you look [806] at the books and observe the entries and then make your computations from the face of the records?

A. No.

Q. Or did you go back of the records?

A. No, I went back of the records to substantiate them in ordinary procedure, both the receipts, checking them through the bank, and the expenditures by checking the invoices and seeing they were properly distributed, in a test manner, as much as possible.

Q. You did that in each instance of each and every transaction?

A. Not each and every, no. That would be re-doing it, which is not ordinary accounting procedure. We do what is called test-checking, and I test-checked during the period.

(Testimony of Jack Marvin Ostrow)

Q. In other words, you made what is known as a check test? A. That's right.

Q. You made one statement for Mr. Finley which has been introduced here in evidence, as of February 28, 1945?

A. That's right. 1945, — yes, that is correct.

Q. And that included the period as of January 1st to February 28, 1945? A. That is correct.

Q. You have included in that report, which has been filed here, all the transactions that occurred in connection [807] with the enterprise as of January 1st to February 28th of that year?

A. During that period, yes.

Q. Yes. You didn't take into consideration that the ballroom was not in operation until February 3rd, did you?

A. Well, I don't follow the question. There were expenditures during January in preparation, and in getting the park ready and improving the park. There was pay roll incurred prior to February 3rd. Those were naturally taken into consideration as a part of the operations of that enterprise, yes, but the receipts did not come in until the date of the opening, and I believe that was February 3rd.

Q. That is what I want to understand, that you have included in your first report, as of January 1st to February 28th, the proper accounting for improvements, and repairs and salaries, and other charges, during the month of January, 1945? A. That is correct.

(Testimony of Jack Marvin Ostrow)

Q. What you did is you just made up a story of the business done there, irrespective of the date the ballroom opened?

A. Well, it was a new venture and I reflected the condition in the operations of that venture, yes.

Q. Now, I will hand you these various exhibits. I think I have them all, Mr. Ostrow. Then you can follow me, and [808] I will be quite brief on it. Turn to the February 28th item on Exhibit B-1, and I note that for the month of February the total receipts from the ballroom alone were \$18,351.48.

A. That is correct.

Q. Is that correct? A. That's right.

Mr. Christensen: Mr. Doherty, would you permit me to interrupt you? Do you have copies of those so that I could be following them? Do you have your own office copies here?

The Witness: Yes. They are in my brief case.

The Court: You may get them.

The Witness: Thank you.

Mr. Christensen: I only had one carbon copy, Mr. Doherty, and I gave it to you.

(The documents referred to were handed to counsel.)

Mr. Christensen: Thank you, Mr. Doherty, for permitting the interruption.

The Witness: That was Schedule B-1, and not Exhibit B-1, Mr. Doherty.

Mr. Doherty: That is right. It is Schedule B-1 of the exhibit. The number is stamped on the front there.

The Clerk: 12-A.

Mr. Doherty: Exhibit 12-A.

The Court: Will you refer to the exhibits by number, as they are marked, as we go along. [809]

(Testimony of Jack Marvin Ostrow)

The Witness: Yes, your Honor.

Q. By Mr. Doherty: Is that figure I gave you correct?
A. That is correct.

Q. Then you have on that same schedule of that same exhibit, under expenses, this item of \$9,345.12. That was for the period of February for bands, doorman, cashiers, et cetera, was it not?

A. That is correct.

Q. That is only for the month of February?

A. Only for the month of February, yes.

Q. Then under that you also have the next item of \$7,100.00, entertainment fees. Now, that was solely for the month of February, too, was it not?

A. That is correct. It was solely for the month of February.

Q. How is that?

A. That is solely for the month of February.

Q. Yes. You also have there the item of \$789.10, maintenance and repairs; is that correct?

A. That is correct.

Q. Mr. Ostrow, if you just nod your head, this young lady will never understand what you are saying.

A. I am sorry, Mr. Doherty.

Q. Those were maintenance and repair expenses made in connection with the ballroom? [810]

A. That is correct.

Q. Those were in addition to the repairs and alterations made during the month of January, were they not?

A. That is correct, yes.

Q. Is that right? A. That's right.

(Testimony of Jack Marvin Ostrow)

Q. You have already included in there a more substantial sum, which you have taken into account in making up this record of February 28, the repairs and maintenance during the month of January?

A. No. Mr. Doherty, the major portion of the maintenance and repairs were capitalized, and were charged to what is known as leasehold improvements, or furniture and fixtures, as the case may be. In the case of these original repairs they were capitalized to leasehold improvements and amortized over the three-year life of the lease, and only the proportion charged, which would be in this instance $2/36$ th, since it comprised two months of those large repairs.

Q. I said you had taken them into account, the repairs and maintenance in January; you had taken them into account in making up this report?

A. Yes. I misunderstood you. I am sorry.

Q. That is correct? A. Yes, that is right.

Q. You did charge off in this report a portion of the [811] so-called capital account in making up this report? A. That is correct.

Q. But you did not charge as capital the additional item of \$789.10. You charged that to expense?

A. That is correct.

Q. Would you explain to me the nature of that maintenance and repairs that were made in February, that were charged to expense and not to capital, or do you remember?

A. Well, it would be a little difficult to recall, but the items would generally consist of—for example, in the ballroom on the floor they used a lot of soap, or conditioning, to keep the dance floor proper, which was used up

(Testimony of Jack Marvin Ostrow)

each month. That is a heavy portion of it, or items like brooms, and so forth, which would be absorbed in the normal course of business. I don't recall the items that made up particularly the \$789.00, however.

Q. But you feel that they were items of that character?
A. Yes, I do.

Q. You have on that same schedule traveling expenses, \$601.18, and you charged that off as an expense?

A. Yes, I did.

Q. Did you make any inquiry as to what those traveling expenses consisted of?
A. Yes, I did.

Q. By whom were they incurred? [812]

A. Primarily by Mr. Finley.

Q. Did it show to what point or points he traveled?

A. Yes, it did. There were quite a few trips, I remember, to Los Angeles and back, in connection, as he stated, with getting merchandise for the ballroom and in making arrangements for possible booking of bands, and contacting people in Los Angeles. [813]

Q. Was there any effort to break down those expenses to determine whether they were incurred in any respect in connection with any of the activities of the Trianon?

A. There was an attempt made; and since I do do the audit on the Trianon, I can say that there are charges on the Trianon books for what was felt was a proper share of the traveling expenses.

Q. Did you find a traveling expense item there in the Trianon for January and February, 1945?

A. I am sorry that I can't tell you right now.

Q. You cannot tell that?
A. No.

(Testimony of Jack Marvin Ostrow)

Q. Well, when you saw this item of traveling expenses did you check behind the entry to see what checks were issued and the purpose of the checks?

A. Yes; I did.

Q. In each instance? A. That is right.

Q. Now, turn to Schedule B-3 of Exhibit 12-A. I see an item there of salaries \$2,922.55. What salaries were they?

A. Well, they were men on the payroll who were employed to help in the advertising publicity in connection with Mission Beach. There were men employed during a good portion of the time which I did the audit, specifically for writing publicity and newspaper columns, or the radio plugs that was [814] incurred by Mission Beach. I don't know the individuals at this point, however.

Q. In other words, those were salaries for publicity men and advertising men for the Mission Beach enterprise? A. That is right.

Q. Then you have next, the item immediately under that: "Outside Fees \$950.00," and what were they?

A. They were outside publicity agents in Hollywood who made contact and helped place publicity in the trade papers, and so forth. I believe one of the names there was Barney McDevitt and Associates, as I remember it, and I believe there were others of the same nature.

Q. Then you have an item: Newspaper advertising \$4,127.03. Was that advertising in the San Diego papers?

A. That is correct.

Q. That is for the months of what, January and February? A. January and February.

(Testimony of Jack Marvin Ostrow)

Q. And you have no further breakdown of that other than that they were newspaper ads?

A. I don't follow you on "further breakdown," Mr. Doherty.

Q. I mean what type of papers; trade papers or—

A. No; they were primarily in the local papers, in the local San Diego papers. There was some in the trade papers, too. [815]

Q. And the item of: Posters \$3,494.92. Were those for posters in and around the San Diego area?

A. Yes; that is correct.

Q. And both the newspapers and the posters were for the entire Mission Beach enterprise?

A. That is correct.

Q. This last item of that schedule B-3, is \$1,633.05 miscellaneous. What did that consist of?

A. Well, during that period, during this particular month it was very high because there was a very large opening night, to which, as I recall, Mr. Finley had invited quite a few of the local dignitaries in San Diego as well as people in the trade, and had a catered dinner, or at least a buffet dinner, I should say, at the ballroom, at the opening under the new management of the park. That was, I would say from recollection now, the largest item in that "Miscellaneous" there.

Q. He put on a dinner for the important people in San Diego at the ballroom on the opening night?

A. As part of the opening. The ballroom was in operation and it drew out quite a large crowd that night.

Q. Well, but this particular item of \$1,633.05, you say the principal part of that was for this dinner?

A. That is correct.

(Testimony of Jack Marvin Ostrow)

Q. And entertainment to visiting dignitaries at the [816] opening of the ballroom?

A. That is correct.

Q. Now, you have under this item I have called off—and I have omitted some of the smaller items—a total expenditure of \$14,156.74, and you charge \$1,050.00 of that to the concessions, is that right?

A. No; that is not right. I did not charge it to the concessions, but the concessions leases, that is, the leases that Mr. Finley had with the individual concessionaires, provided for a payment by them of a weekly sum or a monthly sum for advertising.

Q. Yes.

A. And I deducted that portion which would apply to the park and the rest of it was for the ballroom advertising.

Q. Yes. But in your computation here, then, you charge this entire item that I read off to the ballroom?

A. That is right.

Q. Although the newspaper advertising and the publicity men and the posters were for the purpose of advertising the entire project?

A. Yes and no. If I may explain?

Q. Well, now, let us be specific. Didn't I ask you a few minutes ago whether or not the salaries of these publicity men and ads in the newspapers and the posters were not for the Beach project, and you said, "Yes"? [817]

A. Yes. Yes.

Q. But you charged it all to the ballroom in this Exhibit 12-A?

A. Well, Mr. Doherty, when you ask me "Beach project" I take the ballroom as part of the Beach project.

(Testimony of Jack Marvin Ostrow)

Q. It is a part of the Beach project, yes.

A. And the major part, from the point of view of this advertising, because I test-checked the lineage, the make-up of those ads, and practically all of it was for to announce the bands, the coming attractions at the ballroom. There was very little in the ads which went for the park other than the ballroom.

Q. You were not aware, then, of the policy that Mr. Finley had established of building up the ballroom as a feeder to the concessionaires?

A. I wasn't aware of the policy, no. I just checked the expenditures and that is the way I found them.

Q. Yes. In other words, that is the way they appeared on the books and that is the way you wrote them off in this report?

A. That is correct.

Q. Turn to Schedule B-4. You have there "Salaries, \$3,218.89." What were those salaries on?

The Court: Is that the same exhibit, Major?

Mr. Doherty: Exhibit 12-A, yes, your Honor. [818]

A. Well, those were salaries, as the schedule is headed, of the grounds and park maintenance men.

Q. That is, the various employees there?

A. That is correct.

Q. And in that connection you have the salary of a park manager for two months, \$1,950.00. Was that one individual?

A. I believe it was, although I do believe that there was a portion of the December salary in there.

Q. A portion of what?

A. Of the salary for December of this one particular individual.

(Testimony of Jack Marvin Ostrow)

Q. At the lower end of that schedule B-4 of this same exhibit, you have "Executive salaries, \$1,433.34." Whose salaries were those?

A. I am sorry, sir, I am not following. On B-4?

Q. Yes; it is B-5. It is on the same sheet. I was reading from the top of the sheet, Mr. Ostrow, and I note you have a memo on the margin there that the lower part is B-5. It is on that same sheet.

A. Yes. There was employed a park—that is, a top manager; I believe that they refer to him here as Mr. Austin. He is the salaried executive. There was another one at that time, I believe, too, a Mr. Birdell, but it does not—

Q. Mr. Austin was the park executive officer, is that [819] correct?

A. That is right, plus another one at that time, a Mr. Birdell, I believe.

Q. And that item was \$1,433.34 for what period of time?

A. For the period of January and February of 1945.

Q. On that same Schedule B-5, Exhibit 12-A, you have "Entertainment and Gifts, \$807.80." Did you verify what that was for?

A. Well, as best I could; yes. I verified that a great portion of them were gifts in San Diego to build up, as was explained to me, good will for the firm, particularly as this is a part of the Christmas period.

Q. You mean this included gifts made in December, 1944?

A. That is correct.

Q. Were you aware of the fact that the lease with the City of San Diego was not effective on this undertaking until January the 3rd, 1945?

A. Yes, I was.

(Testimony of Jack Marvin Ostrow)

Q. And you charged, however, items spent for Christmas gifts in December, 1945 (1944)?

A. Well, Mr. Doherty, I also charged the costs of preparing that bid in October to this because it was part of this operation.

Q. Mr. Ostrow, I did not ask you that. I said, didn't you charge as gifts made in December, 1944, for an operation [820] in January and February, 1945?

A. That is correct.

Q. And what did those gifts and entertainment consist of, if the record shows?

A. I am sorry. I wouldn't recall them now.

Q. Can't you remember any of them?

A. No. They were substantiated by the checks that were paid out or by invoices where they were bought from stores.

Q. And they were all represented by invoices?

A. Not all.

Q. Or by invoices and checks?

A. Yes, sir.

Q. In other words, you saw on a check in a given amount for gifts and entertainment, and you accepted that as a proper expenditure?

A. That is correct.

Q. And the checks were signed by Mr. Finley?

A. Either by Mr. Finley or by Mr. Austin or by Mr. Birdell.

Q. Did Mrs. Finley sign any of the checks?

A. No; I don't believe that she did.

Q. Are your books set up there on the basis of a partnership respecting this Beach enterprise?

A. I don't follow the question.

(Testimony of Jack Marvin Ostrow)

Q. Do your books and records show that it is a partner- [821] ship?

A. It is operated by the partnership; yes.

Q. And that partnership is Larry Finley and his associates, consisting of Mr. and Mrs. Finley?

A. That is correct.

Q. And your records so show?

A. That is correct.

Q. See if I can boil this down now in a sentence or two. Your ballroom income for February was \$18,351.48; that is Schedule B-1? A. Yes, sir.

Q. The expenses against that in the way of salaries, maintenance, traveling expenses, stationery, outside fees of these advertising agents, newspaper advertising, radio, posters, depreciation, and some of the other items I have called your attention to—and I am not attempting to cover all of them—aggregate a total expenditure—have you got those, Mr. Ostrow, compiled some place where they have all been totaled up for that February?

A. Are you referring to the operations of the ballroom department alone?

Q. Yes.

A. Schedule B-1, is that it, at the bottom of the schedule?

Q. I believe it does, yes. In other words, we will [822] have to take two or three items.

I will go back, Mr. Reporter, and ask Mr. Ostrow: The total income of the ballroom was \$18,351.48?

A. That is correct, sir.

Q. I am reading from Schedule B-1. Then you had a total there of three items of expenses, and including de-

(Testimony of Jack Marvin Ostrow)

preciation and advertising, namely, \$19,485.78, \$511.41, \$13,106.74; is that correct? A. That is correct.

Q. And that was a total outlay that you have charged against the ballroom for the months of January and February, 1945? A. No; that is not correct.

Q. Are there some other items that I have overlooked?

A. Yes. On Exhibit B-1—on Exhibit B-2—I am sorry—which precedes that, there are the portions of the general overhead items which is attributable to the ballroom.

Q. That is the item of \$5,169.75?

A. That is correct.

Q. And with those items added together and subtracted from the income, you showed a net loss for the ballroom for January and February, 1945, of \$19,243.15?

A. That is correct, sir.

Q. You made a separate report respecting the concessions? A. Yes, sir. [823]

Q. And that is also for January and February of 1945? A. Yes, sir.

Q. The concessions were in operation in January, were they not?

A. No; I don't believe that they were. They opened, I believe, at the same time that the park opened.

Q. And you charged, then, in this account, the expenses against the concessions even though they were not open for the month of January?

A. If they applied to the park operations, yes.

Q. And you had gross income from the concessions for that period, Exhibit B-1 of your audit, Plaintiff's Exhibit 12-A in this case, \$19,084.02? A. Yes, sir.

(Testimony of Jack Marvin Ostrow)

Q. And a net income for that period for the concessions of \$7,999.89? A. Yes, sir.

Q. And that gave you, then, a net loss for those two months of—you can figure faster than I can. Deduct those two items.

A. Well, it is a little over \$11,000, or do you want to have it exactly?

Q. It will give you somewhere between ten and eleven thousand dollars? A. Yes. [824]

Q. Is that right; or a little over \$11,000?

A. A little over \$11,000; yes, sir.

Q. Are the books set up down there on a separate basis for the concessions and the ballroom operations?

A. I don't follow the question.

Q. Are there two sets of books?

A. No; there are not two sets of books, no; but within the sets, the receipts are separately recorded from the separate enterprises and the expenditures are allocated, as is the statement, in the same manner that the statement is extended.

Q. You did not do any auditing work or service for Mr. Finley after July 31st?

A. Not at Mission Beach.

Q. In other words, your report goes up to the July 31st statement and not beyond that date?

A. That is correct, sir.

Q. Would you turn to the July 31st statement and look on the back of it and give the number of the exhibit in this case so the reporter will have it?

A. 12-C.

(Testimony of Jack Marvin Ostrow)

Q. Plaintiff's Exhibit 12-C. Turn to Schedule B-1. This report only covers the period from March 1st to July 31st? A. That is correct, sir.

Q. Both inclusive? [825] A. Yes, Sir.

Q. That is, March, April, May, June and July; that is five months? A. That is correct, sir.

Q. And it shows total revenue or income from the ballroom for those five months of \$115,182.63?

A. Yes, sir.

Q. And that, added to the figure for February of \$18,351.48; gives in round numbers \$153,500 income?

A. I believe, \$133,500.

Q. You are correct; \$133,500 in round numbers.

A. Yes, sir.

Q. For those six months. Then, you have total expenses for those five months, March 1 to July 31, as against the ballroom, including depreciation, advertising (\$126,208.18)

and publicity, three items, \$126,218.18, \$1,463.40, and \$40,012.65; and then, on B-2, an additional charge as against those operations of \$19,291.02—

Mr. Christensen: Would you show me where you are reading from, Mr. Doherty? I did not follow you. B-2?

Mr. Doherty: You are using Exhibit B-2 now.

Mr. Christensen: I was following Schedule B-2.

Mr. Doherty: It was B-2 in this. I don't want to refer to it as an exhibit.

The Court: No. 12-C, I think, is the exhibit. [826]

Mr. Christensen: Here they have denominated some of these "Schedule B-2" and some of them "Exhibit B-2", is where I fell off.

(Testimony of Jack Marvin Ostrow)

Mr. Doherty: Were you following me?

The Witness: Yes; and there was merely one correction. The total direct expenditures on Schedule B-1 on this report is \$126,208.18. I believe you read "218.18".

The Court: Now, you had not completed your examination, Major. You got to that item of \$19,000 when you were interrupted. Had you completed your question to him?

Mr. Doherty: I have finished with February. I am now on this exhibit.

The Court: I know. But when you were interrupted by Mr. Christensen you were interrogating about that item of \$19,000-plus.

Q. By Mr. Doherty: That is \$19,291.02?

A. Yes, sir.

Q. Did I misread that, Mr. Ostrow?

A. No; that one was correct.

The Court: No; you did not misread it. But you did not close your inquiry by asking whether that was to be added to the other figures.

The Witness: Yes.

The Court: Was it added?

The Witness: Yes; it was added to the other figures read. [827]

The Court: What is your total?

The Witness: Well, I don't have them, but it would be about \$180,000-odd, I believe.

The Court: What does that represent?

(Testimony of Jack Marvin Ostrow)

The Witness: Those represent all of the expenses chargeable to the ballroom, either through overhead or directly.

Q. By Mr. Doherty: During this period of five months, in round numbers—I am just running these off now—about \$187,000 chargeable to the ballroom?

A. Yes, sir; that would be correct.

Q. I may have missed it a couple of hundred. And, as against that, you have already testified you had income of \$115,182.63 for the five months?

A. Yes, sir.

Q. And taking this \$187,000 item, in order to get the full period for the 7 months you must go back to the February item and add in there the totals I just had of around about \$37,000 or \$38,000, wouldn't it be?

A. Yes; about \$38,000. Yes.

Q. So, in round numbers, you would have about \$225,000 of expenses and deductions for those 7 months?

A. Yes, sir.

Q. As against your income that you have already testified to? [828]

A. Yes, sir.

Q. Let us break that outline down just very briefly, so I won't tire you or the court or the jury. During those five months, according to Schedule B-1, there was \$40,000 in advertising and publicity, was there not?

A. Yes, sir.

Q. And the traveling expenses of \$8,642.46?

A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. And maintenance and repairs, \$1,040.88?

A. Yes, sir.

(Testimony of Jack Marvin Ostrow)

Q. Now, those traveling expenses of \$8,642.46 were in addition to the other item I called your attention to a while ago for January and February?

A. Yes, sir; which item was \$601.00, I believe.

Q. Yes. That would be about \$9,300.00 for the seven months in traveling expenses? A. Yes, sir.

Q. You followed the same procedure, did you not, in the matter of advertising as you did in the January and February report, of charging up posters, newspapers, fees of publicity men, outside fees of these agents, radio, and other matters to the ballroom operation?

A. Yes, sir. [829]

Q. Although they were advertising the entire project?

A. Well, yes, sir.

Q. During that period, your newspaper advertising—when I say “period” that is the five months, March 1 to July 31—was only \$8,398.43, wasn’t it?

A. Yes, sir.

Q. And your radio was \$5,416.23?

A. Yes, sir.

Q. And your posters, \$13,746.69? A. Yes, sir.

Q. What were the special events that cost \$1,777.40?

A. They had at the park particular attractions. I believe once they had a tight-rope artist or something in that nature out there for several weeks, but I don’t remember the type of acts. But they had 4th of July fireworks celebration, for example, fireworks, and so forth, at the park.

(Testimony of Jack Marvin Ostrow)

Q. And you charged that all against the ballroom department?

A. Well, again, Mr. Doherty, remember that from the total advertising we did deduct the portion of the fees recovered from the concessionaires which would be the concessionaires' portion of the advertising, and the balance would go to the ballroom.

Q. That was an arbitrary percentage that you deducted [830] from the concessionaires, was it not?

A. No; it was no percentage. It was the amount provided in the leasing agreement between Mr. Finley and the concessionaires.

Q. When I said "arbitrary percentage" I mis-spoke myself. That is an arbitrary fixed sum in the contract between Mr. Finley and the concessionaires?

A. Yes, sir.

Q. In other words, that came in whether or not Mr. Finley advertised or did not advertise?

A. No. He had to advertise the park up to that amount.

Q. Up to the amount of the concessionaires?

A. At least up to the amount of the concessionaires; yes.

Q. But he advertised seven times more, did he not? I will give you the figures.

A. Yes.

Q. You have got in here a total charged to the ballroom operation of \$46,877.65, March 1 to July 31, and you charged the concessionaires \$6,865.00, is that right?

A. Yes, sir.

(Testimony of Jack Marvin Ostrow)

Q. In other words, you charged \$40,000 against the ballroom operation and \$6,800 against the concessionaires?

A. Well, perhaps we don't quite agree again in terminology. You say I charged. That is not exactly what happened. [831] I did not charge. I had—

Q. Well, you credited?

A. I had all of the advertising expenses of the various forms in total, and then the portion that was recovered from the concessionaires was deducted from that. From the analysis and testing of the mediums of advertising and the contents therein, it was determined that the ballroom stood at least that proportion. [832]

Q. In other words, you deemed that a proper charge against the ballroom for them to have fireworks out in the park and a tight-rope walker?

A. I deemed that over-all, Mr. Doherty, the content of the advertising was, I would say, more than 90 per cent to the ballroom, and the total charge here was about \$46,000.00. Ten per cent to the concessionaires would only have been \$4600.00, and they paid for about \$6800.00. That is an estimate made, based upon the medium used, over-all.

Q. Well, to be specific let us get down to the tight-rope walker and the fireworks. You charged all of that, did you not, to the ballroom operation, less approximately 12 per cent, which went to the concessionaires?

A. Well, the tight-rope walker, as referred to over here, was \$1700.00. That is but a very small portion of the total \$46,000.00 that was spent on advertising. I don't follow your question clearly there.

(Testimony of Jack Marvin Ostrow)

Q. Well, look at Schedule B-3 of your exhibit.

A. Yes.

Q. Your total up here, including the tight-rope walker, is \$46,877.65. That is the total for salaries, outside fees, newspapers, radio, posters, and everything else?

A. Yes, sir.

Q. Then you had coming in from the concessionaires, \$6,865.00? [833]

A. Yes, sir.

Q. And you deducted that from the total expenditure of forty-six thousand plus dollars?

A. That was charged—

Q. To the ballroom? A. Yes, sir.

Q. And then you left a net charge against the ball-room operation for those purposes of \$40,000.00?

A. Yes, sir.

Q. Then didn't you charge approximately 88 per cent of the tight-rope walker and the fireworks to the ball-room?

A. Over-all, yes, if you pick out that one individual item. That is not the proper method of computing it. The net effect may be that you have questioned me about, but I didn't break each item in the expense account that way.

Q. No, you didn't break it that way, but isn't that the effect of the total? A. Yes, sir.

Q. You didn't take each item and break it down, but you totaled it all up and then deducted a credit for the concessionaires, and charged the balance to the ballroom?

A. Yes, sir.

(Testimony of Jack Marvin Ostrow)

Q. Now, on Schedule B-4, you have an item of \$2,-892.50 for park manager. That is from March 1st to July, 1944, inclusive? [834]

A. Through July, yes, sir.

Q. That was one person, was it not?

A. Yes, sir.

Q. Who was the park manager at that time?

A. I believe during most of that time a Mr. Mulenkamp, Al Mulenkamp, was the park manager.

Q. What office did Mr. Austin have during that period?

A. Well, during some of that period Mr. Austin was in service, and when he was there he was one of the executive salaried men, over-all.

Q. Do your records show how many months he was in the service?

A. I believe they might. They would show, yes, because his salary was different then.

Q. He was in the service around about three or four months?

A. I don't recall the number of months, Mr. Doherty.

Q. When he wasn't in the service, what was his salary?

A. When he was not?

Q. Yes.

A. I believe he got \$1,000.00 a month.

Q. That continued up until July 31st. so far as you know?

A. No, I don't remember when he entered service, sir. I don't know when he went off salary. [835]

(Testimony of Jack Marvin Ostrow)

Q. Was he with Mr. Finley as of the month of July, 1945?

A. I am sorry, sir, I couldn't tell without an examination of the records.

Q. But your records do show while he was there he was getting \$1,000.00 a month?

A. Yes, sir.

Q. What job did he hold, according to your records?

A. Well, he did the over-all contact public relations for the park, and he has subsequently taken over complete management of the Mission Beach enterprise.

Q. In other words, Mr. Finley was not in charge, according to your records there?

A. I don't follow the question. Mr. Finley didn't draw a salary. Of the salaried people, Mr. Austin was in charge.

Q. But you said that Mr. Austin took over the entire management of the park?

A. I am sorry. I said subsequently. That was since July. I wouldn't speak of knowledge, during the time I was auditing.

Q. While he was there, did he take over complete management?

A. No, sir.

Q. So you don't know what happened later?

A. No. [836]

Q. Now, the concessions from March 1st to July 31st showed a net profit of \$40,450.00?

A. Yes, sir.

Q. And the ballroom, according to your statement here, showed a net loss for those five months of \$67,247.00?

A. Yes, sir.

(Testimony of Jack Marvin Ostrow)

Q. Making the net loss for the enterprise about, roughly speaking, \$27,000.00, or a little less than \$27,000.00?

A. That's right, sir.

Q. Turning to Schedule B-3 of Exhibit 12-C, what is that item of \$1,864.73, entitled "Miscellaneous"?

A. I would not be able to give you an itemization of it without an examination of the records, Mr. Doherty.

Q. Turn to Schedule B-5 of this same exhibit, and we find an item of \$2,602.24, under the heading, "Entertainment and Gifts." What is that made up of?

A. They were the same type of items that I had mentioned in the earlier report.

Q. Was there a dinner given every month to the dignitaries?

A. No, but it was a practice that during the early part of the ballroom operations there, at the opening of each new band, to have a little bit of an opening in the ballroom.

Q. In other words, there was something in the way of a [837] dinner to the dignitaries?

A. No dinner. I believe, from memory, the only time there was a dinner was at the grand opening, February 3rd, but there may have been some other entertainment or refreshments served at the opening of other bands.

Q. Can you give me any further breakdown of what the item of \$2,602.24, Entertainment and Gifts, consisted of, other than what you have said?

A. Not from memory, sir.

Q. All you saw was the check written for gifts and entertainment, and you accepted them as such?

A. Many of them were substantiated by vouchers.

(Testimony of Jack Marvin Ostrow)

Q. Were most of the checks drawn to cash or to individuals? A. Cash.

Q. And no vouchers shown for it?

A. Not in most instances, sir, no.

Mr. Doherty: Your Honor, it is very difficult to examine a fine, experienced auditor on just a few minutes' preparation.

The Court: I do not want you to feel limited, Major. Take all of the time that you need.

Mr. Doherty: But there is a limit to every one's patience.

The Court: We are all patient here. The jury looks very [838] patient, and I am feeling entirely composed, so you take all the time that you think necessary.

Mr. Doherty: I would suggest, if I might, your Honor, that I don't know what information I may get from our accountants in the meantime, and I wonder if I could call Mr. Hansen a little out of order and I could get some preliminary work done with him. I see we have just about fifteen minutes left, and then Mr. Ostrow could return at 2:00 o'clock. I am only suggesting that as a matter of expediting the examination.

The Court: Very well.

Mr. Christensen: Would you mind if I asked just one question now, or would you rather that I defer it?

The Court: I think you had better defer the re-direct examination until Major Doherty finishes with his cross-examination.

Mr. Christensen: Very well.

The Court: You may leave the stand.

Mr. Doherty: Mr. Hansen.

EUGENE A. HANSEN,

recalled as a witness on behalf of the plaintiff, having been previously duly sworn, was examined and testified further as follows:

Cross-Examination

The Clerk: You have been sworn? [839]

The Witness: Yes.

By Mr. Doherty:

Q. Where is your office, Mr. Hansen?

A. San Diego.

Q. How long have you been in business there?

A. I have been there since '37.

Q. You are a public accountant? A. Yes.

Q. I don't mean to infer by that that a public accountant isn't just as capable as a certified public accountant.

You have your own office there? A. Yes.

Q. When did you go to work for Mr. Finley?

A. Sometime in the month of August.

Q. 1944?

A. Yes. The exact date I don't know, but I did render the August statements.

Q. What type of work did you do for him in connection with the Mission Beach enterprise?

A. A monthly audit and prepared financial statements.

Q. How much time did you spend over there?

A. Oh, approximately about eight days a month.

Q. Would you go personally? A. Yes.

Q. Would you take your assistant along? [840]

A. At times I did, and at times I didn't.

Q. You took over on the job where Astrow left off?

A. Yes.

(Testimony of Eugene A. Hansen)

Q. And you followed the same method of setting the matter up that he did? A. Yes.

Q. Would you look at this Exhibit 12-F. I think that has been prepared by you. Is that correct? (Handing document to witness.) A. Yes.

Q. Turn to B-2, which is the third sheet of that.

A. That is Exhibit B-2.

Q. It is Exhibit B-2, but we refer to the exhibits as the court numbers here, which in this case is 12-F. You have an item there of \$1,249.85 as the expenses of this law suit. You have charged that against the ballroom operations, have you? A. Yes.

Q. I will give you some composite numbers here. Tell me what schedule the park manager is on, or the executive salaries.

A. Well, for the month of December they have no park manager.

Q. Well, the executives.

A. Well, just a minute. [841]

Q. Is that B-5? I think it is B-5. A. Yes.

Q. It says, "Salaries, Executive, December, 1945, \$1,000.00." A. That's right.

Q. Who got that? A. Warner Austin.

Q. Mr. Wayne Austin? A. Warner Austin.

Q. Who? A. Warner Austin.

Q. How long had he been drawing that salary, according to your records?

A. I think Mr. Austin came back in the month of September. I am not sure, but I think it was.

Q. What were his duties, according to the record that you examined there? A. As manager.

(Testimony of Eugene A. Hansen)

Q. General manager?

A. I wouldn't say manager. He was manager of the park.

Q. Manager— A. Or of the ballroom.

Q. Was he manager of the park or the ballroom?

A. No, he wasn't manager of the park. He was manager [842] of the ballroom. He took care of the bookings, and so forth.

Q. He took charge of the bookings?

A. Well, I wouldn't say took charge of it, but he followed it through.

Q. That was his job, then, in the ballroom, to follow through the bookings of the bands and the entertainment for the ballroom?

A. That's right. That is my idea of it, yes.

Q. That is what the records show? You are only testifying from the records, are you not, Mr. Hansen?

A. Yes. If you want to put that in the category of a manager, I would say yes; if that is the duties of a manager. He also supervised the office force.

Q. Well, I am only asking you, and all you can testify to, as an accountant, is what the records show.

A. That's right, he was a manager.

Q. He was manager? A. That's right.

Q. And the records there show that a part of his duties as manager was supervising the office force?

A. Yes.

Q. Also following through in the booking of bands and the entertainment for the ballroom?

A. The records don't show that, no. That is conversations [843] I have heard he have over the telephones

(Testimony of Eugene A. Hansen)

while I was in the office performing my duties, and that is my own opinion.

Q. In other words, you being around several days each month, in the same office that he was, you saw the duties that he was performing? A. Yes.

Q. And heard the telephone conversations, and from that you made the statement that he was in charge of the jobs you just told me? A. That's right.

Q. Now, Schedule B-1 of this same exhibit shows an item of \$12,135.59 as traveling expenses. Is that correct?

A. For the year to date, yes.

Q. Pardon?

A. For the year to date, yes, up to December 31st.

Q. That was only from March 1st?

A. That's right.

Q. It wasn't for the year, just from March 1st?

A. Yes. They are on a fiscal year accounting basis.

Q. In the fiscal year? A. Yes.

Q. But it is only ten months of the fiscal year?

A. That's right.

Q. Who spent that money in traveling expenses. if the records show? [844]

A. Well, as far as I can go back, Mr. Finley.

Q. In that same schedule you show at the top of the expense column, salaries and bands, \$137,225.87?

A. Yes, sir.

Q. That is for ten months? A. Yes, sir.

Q. Then you have another item of \$6,325.00, stage show fees. Is that right? A. Yes.

(Testimony of Eugene A. Hansen)

Q. Those were stage shows in connection with the ballroom operation?

A. Well, I think you will find that that \$6,325.00 occurred prior to August 1st, the biggest portion of it.

Q. But it was for stage show fees?

A. That is my understanding, yes.

Q. That was for entertainment in connection with the ballroom? A. Yes.

Q. You have an item there of Miscellaneous. I am not going into it. You don't know what the miscellaneous items consist of, do you? A. Not right offhand, no.

Q. So I am not going to take up your time on that. To boil it down here, according to your statement of December 31st, they lost \$103,523.87 in the ballroom operations? [845] A. Are you reading that from—

Q. The first sheet? A. The first sheet, yes.

Q. Is that right? A. That's right.

Q. And they made a profit of \$74,875.92 from the concessions? A. That's right.

Q. Is that correct?

A. Yes. The way the books are set up, yes.

Q. Which made a net loss of about \$28,500.00,—

A. Somewheres around there.

Q. —for the entire operation?

A. Yes, for the ten months.

Q. During that period? A. Yes.

Q. Would you during the noon recess, if I won't impose on you, sit down with Mr. Ostrów and give me these items, so that we will get them all together? You might make a note of them, because it will save us a lot

(Testimony of Eugene A. Hansen)

of time. I want the composite total income for the 12 months period of the ballroom and the concessions.

A. From January 1st, 1945 to December 31st?

Q. Yes, that will give us the 12 months. The total amount paid out for all purposes, all expenditures chargeable [846] against the ballroom and the concessions.

A. You don't want it split? You just want the total income from the park. Is that the way I understand it?

Q. The total income from the park, that is, from the entire operation. A. Yes.

Q. And the total expenditures. That is one group.

No. 2 group: Income for the 12 months from the ballroom; income for the 12 months from the concessions; expenditures for the 12 months from the ballroom; expenditures for the 12 months for the concessions. Do you follow me? A. I follow you.

Mr. Doherty: Now, next, and you had better make a note of this one, the amount paid out for the ballroom for bands and entertainment fees for the 12 months, and the amount paid out in salaries of all types chargeable to the ballroom, for the 12 months; and the amount paid out in the way of publicity, that is, newspaper, radio, posters, publicity men, outside fees, and all these other, for the 12-months period.

The Witness: Chargeable to the ballroom?

Mr. Doherty: Chargeable to the ballroom, yes.

The Court: We will take our recess now, ladies and gentlemen, until 2:00 o'clock this afternoon. Remember the admonition and keep its terms inviolate.

(Whereupon, at 11:55 o'clock a. m. a recess was taken until 2:00 o'clock p. m. of the same day.) [847]

Los Angeles, California, Wednesday, February 6, 1946.
2:00 p. m.

The Court: All present. Proceed.

Mr. Doherty: Mr. Hansen.

EUGENE A. HANSEN,

called as a witness by and on behalf of the plaintiff,
having been previously duly sworn, was recalled and
testified further as follows:

Further Cross-Examination

By Mr. Doherty:

Q. Mr. Hansen, just at the noon recess I asked you
and the other gentleman to assemble some data for me.
Were you successful in getting it for me?

A. We were, the largest portion of it. I think there
is one. Mr. Ostrow has the work sheets there that we
drew up.

Q. He has the work sheets?

A. Yes; he has them there now.

Q. Have you agreed between yourselves as to whether
you should present that or Mr. Ostrow?

Mr. Ostrow: It doesn't matter. It is quite all right.

The Witness: No; we were just going to submit to
to you.

Mr. Doherty: I mean whichever is the most agree-
able between you and Mr. Ostrow, it would be agreeable
to me who [848] should present it.

The Witness: It is immaterial to me. It doesn't
make any difference.

(Testimony of Eugene A. Hansen)

Q. The first item—I am only recalling from memory—was the total income from the joint operation of Mission Beach for the 12-month period.

A. \$374,824.43.

Q. And the total expenditures?

A. You mean the total expenditures on the ballroom or on the whole thing?

Q. You gave me the consolidated here, the \$374,000, in round numbers, refers, I believe, to the total income for 12 months for both operations.

A. That is the concessions and the ballroom and the checkroom.

Q. Is that correct?

A. That is all the income. That is the total income; yes.

Q. Give me the total expenditures for the joint operations? A. We did not work that up.

Q. You did not get that?

A. That is one of the schedules that we did not get to; no.

Q. That is one of the items you did not get to. Can [849] you give me the breakdown for the ballroom income? A. The ballroom income—

Q. For 12 months. A. —was \$192,155.09.

Q. \$192,552? A. No; \$192,155.09.

Q. Now, can you give me the ballroom gross expenditures?

A. The gross expenditures, before depreciation and advertising publicity, was 208—

Q. No. I want everything.

A. You want all of it?

(Testimony of Eugene A. Hansen)

Q. The joint; the total expenditures that you charged against the ballroom, including depreciation.

A. All right. Just a moment, please. \$278,389.52.

Q. Now, give me the same information for the concessions. That would be the total income and the total expenditures.

A. As I said before, we didn't have the total expenditures on the ballroom. Mr. Ostrow is working on that right now. I mean on the—

Q. You mean on the concessions?

A. On the concessions, yes; that is right.

Q. You haven't got that yet. You stated on your examination this morning respecting Mr. Warner Austin that you thought he was in the service a period.

Mr. Christensen, for the purpose of simplifying the [850] examination, could we stipulate as to the date he went into the service and the date he was discharged?

Mr. Christensen: Pardon me a minute.

Mr. Doherty: Can you give me an approximation?

Mr. Christensen: He was in the service for about five months, Mr. Doherty.

Mr. Doherty: May we agree on that? Is that correct?

Mr. Christensen: About five months; that is correct.

Mr. Doherty: It is agreed that he was in for about five months, and that would be from about April to September, understanding this, that you may call him and if he gives us the exact dates, then the record may be corrected, with his Honor's permission, as to the correct dates.

(Testimony of Eugene A. Hansen)

Mr. Christensen: You state whatever time you want and I will call him, and then we can correct it, Mr. Doherty.

Mr. Doherty: Five months would be April, May, June, July, August.

The Plaintiff: Do you remember when Mr. Austin came back?

Mr. Doherty: We are trying to arrive at a date to save some time. Probably we are losing time by doing it.

The Court: Apparently you are not making very much progress. Maybe you can have your conference outside of the courtroom.

Mr. Doherty: All right, your Honor. Now, have the [851] accountants brought in the books yet? I think, your Honor, it would be a more orderly examination when the books are in the courtroom, for me to examine Mr. Ostrow first.

The Court: Very well.

Mr. Doherty: And, for the purpose of the examination, on Mr. Warner Austin I will agree that he was in the service for approximately five months, and that would be from April to August, inclusive, for the purpose of our discussion, subject to change as to the correct time if the dates are inaccurate.

Mr. Christensen: That is agreed.

The Court: Satisfactory. [852]

The Court: Mr. Hansen, you will not leave the courtroom?

The Witness: No.

Mr. Doherty: Mr. Ostrow.

JACK MARVIN OSTROW,

called as a witness by and on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-Examination (Continued)

Mr. Doherty: They have handed me a suitcase. Would you pick out of there the necessary books, Mr. Ostrow, respecting the expenditures?

The Court: I want the record to show that a receptacle has been presented that contains a number of records and books. What are they, Mr. Ostrow?

The Witness: This particular one that I have picked out?

The Court: No, the entire set that is contained in the suitcase.

The Witness: Well, there is one that is known as the general ledger, and the general records, consisting of the cash receipts, journal, the check record, the invoice record and the general journal; a subsidiary detail on the number of tickets sold, for federal tax and city ticket tax purposes. The original receipt books, primarily used in giving the [853] receipts to the concessions for their payments of rental; and the cashiers' recaps on the night's receipts from the ballroom operations.

Mr. Christensen: Your Honor, to complete it, of the Mission Beach operation?

The Court: What entity are those the books of?

The Witness: This is both for the Mission Beach Ballroom and for the Amusement Park.

Q. By Mr. Doherty: They are just one set of books?

A. They are one physical set of books, yes.

(Testimony of Jack Marvin Ostrow)

Q. All right. Sit down. Take the proper book which will show the expenditures on given dates. I want you to turn to February 18th as the first item. My attention is called to check No. 42, Shalimar Cafe, \$902.00, charged to publicity and advertising. Can you tell me what that was for?

A. Well, without having the invoice before me, I would say offhand that that is the amount I spoke of this morning regarding the opening catered affair. The owner of the Shalimar Cafe catered it, and I believe that was February 3rd, and this was February 18th. It was paid within the following few weeks.

Q. Now, February 18, check No. 43, drawn to Larry Finley and Associates, \$464.95. What is that?

A. Again, I don't have the invoice in front of me, but [854] from memory I would say that that item represents a reimbursement for expenditures in advertising incurred by Larry Finley and Associates through another bank account he had in the Bank of America Building, down on Broadway. He was using another bank account before they opened the Mission Beach account.

Q. Are you reasonably sure there was an invoice in detail for that?

A. Yes, I am reasonably sure. This has been quite some time since I performed the audit, but I am reasonably sure there was a detail on that amount.

Q. Now, June 16th, check No. 869, Mission Liquor Company, \$203.50. What was that for?

A. Well, from the name to whom the item was paid, it was a part of the entertainment at the various band openings in the ballroom.

(Testimony of Jack Marvin Ostrow)

Q. July 5th, check 919, Golden State Fire Display Company, \$1,000.00. What was that for?

A. I believe that the Golden State was the one from whom the fireworks display was bought, and that was the deposit on the amount of the fireworks for the July 4th celebration, I think.

Q. That is the one that you discussed this morning, that was charged to the ballroom, excepting approximately 12 per cent? [855]

A. It was charged to "Advertising—Special Events," yes.

Q. Now, turn back to May 22nd. May 22nd, check 712, Beverly Wilshire Hotel, \$268.28. Will you make a notation of these amounts because I want to ask you for a total on them. Do you find that there?

A. Yes, I see that.

Q. What was that for?

A. Well, I believe that Mr. Finley was in Los Angeles at that time. As I say, I am speaking mainly on these items now from memory. I don't have any of the vouchers before me.

Q. Then turn to June 2nd, and you will find it at the end of June, it was entered out of order, check No. 763, Beverly Hills Hotel, \$357.55. What was that?

A. It was a like item.

Q. Then June 14th, check 856, Beverly Hills Hotel, \$560.95. Do you find that there? A. Yes, sir.

Q. What was that for? A. The same thing.

Q. The same thing? A. Yes.

(Testimony of Jack Marvin Ostrow)

Q. That is, in the period from May 22nd to June 14, there was a total, according to my computation, of \$1,186.76? [856]

A. Yes. I believe during that period both Mr. and Mrs. Finley were at the Beverly Hills Hotel, as I remember it.

Q. You did not go beyond July, so I will turn back to another account. Turn to April, check No. 663. Do you have it there? A. 663?

Q. Yes, 663.

A. That is a May check, according to this.

Q. Do you find that? A. For \$3.59?

Q. No, this is a much larger sum than that. It is an account charged to general administration, I think account 550, if I am not mistaken. See if you find a \$3500.00 item in there.

A. Oh, that might possibly be a pay roll item, pay roll check No. 663.

Q. Well, you might look at that.

A. I don't believe the pay roll records are here, sir.

Q. They are not here?

A. I don't see them in there, no, sir. The pay roll distribution is not there.

Q. Well, our accountant handed me this memorandum, a check No. 663, \$3500.00, April 1-April 15?

A. Was it a pay roll item, sir? Am I correct in that? [857]

Q. It would indicate from what this shows here. It says pay roll page No. 11.

A. Yes, it was a pay roll item and, as I say, the pay roll book is not here. I don't know where it is. I haven't seen it.

(Testimony of Jack Marvin Ostrow)

Mr. Christensen: Mr. Doherty, does the accountant still have the pay roll records?

Mr. Doherty: I thought they brought in all the records.

The Court: Were the pay roll items brought in this morning?

The Witness: I couldn't say, your Honor, because they were brought in from San Diego. I presume they were. Otherwise they would not have the record of it.

The Court: That is what I gathered, that they must be here somewhere.

Mr. Doherty: I will proceed with another matter while they get that record, or the source of it, because it was handed to me about four or five minutes ago as having been taken from the record.

Q. By Mr. Doherty: Could you take these exhibits and compute a few totals for me while I am waiting for this other, and we will be covering that ground. Examine the records that you have already presented here with the audit, this last number, Exhibit 12-F, and give me the total expenditures for entertainment and gifts for 12 months. [858]

A. If you will give me the exhibit, my statement as of February 28, I will be able to do that.

(The document referred to was handed to the witness.)

There was \$6,680.82. \$807.80 through February 28th and \$5,873.02 from March 1, 1945, through December 31, 1945.

(Testimony of Jack Marvin Ostrow)

Q. Now, give me the same information covering the same period for traveling expenses.

A. That would be \$12,736.77. \$601.18 through February 28, and \$12,135.59 from March 1st through December 31st of 1945.

Q. Give me the totals for expenses, advertising and publicity to the ballroom for the same period, that is, for the 12-months period.

A. That would be \$66,167.02. \$13,106.74 through February 28, 1945, and \$53,060.28 from March 1st through December 31, 1945.

Q. Now, let's discuss that a minute. The total amount for those periods for expenses, advertising and so forth, those items I called for, was \$80,842.02, was is not? [859]

A. What was that figure you just gave me, Mr. Doherty?

Q. Just look at your figures and see if I do not have that correct. For the first two months, \$14,156.74 was the total expenditures for advertising for the enterprise?

A. That is correct.

Q. And for the next ten months, \$66,685.28 was spent for the total enterprise?

A. That is correct.

Q. Making a total of \$80,842.02?

A. That is correct.

Q. Of which you charged against the concessions, or, rather, you received from the concessionaires \$14,675, giving you a figure of approximately \$66,000 in advertising and publicity charged to the ballroom?

A. That is correct.

(Testimony of Jack Marvin Ostrow)

Q. I have just been told that the information I was asking you for came from the payroll check record. Have you got that record here?

A. No; I do not believe that that one is here.

The Court: Did you examine the suitcase before you looked at it here today in court?

The Witness: No; I did not, your Honor.

Mr. Doherty: I will take the two more items and then I will be through on this matter.

Q. Look at that exhibit upon your left, right here in [860] front of you; 12-F is it? A. Yes, sir.

Q. Give me the total amount of income from the ball-room as of March 1, 1945 to December 31. That is in Schedule B-1, is that right? A. That is right.

Q. That is \$173,803.61? A. That is right.

Q. And how much was paid out during that period for bands?

A. As per the statement here, \$137,225.87.

Q. Could you tell me what 60 per cent of \$173,000 would be, just in round numbers?

A. Oh, roughly, about \$102,000.

Q. In other words, 60 per cent, if that was paid the bands, the total would be \$102,000, but instead of that, \$137,000 was paid out in bands? A. That is right.

Q. Now take the same information respecting the first two months, January and February.

May I ask Mr. Ralston to come forward and pick up the book from which he gave me the information, your Honor?

The Court: Yes.

(Testimony of Jack Marvin Ostrow)

The Witness: I am sorry, your Honor. I was mistaken. They have transferred them from the binders that they usually [861] kept them in, and they had them in the front of this book.

The Court: Very well.

Q. By Mr. Doherty: Now look at payroll page No. 11, check No. 663, 4-1 to 4-15, that is April 1st to April 15th, 1945, for an item of \$3,500. Do you find it there?

A. Yes, sir.

Q. To whom was that paid?

A. To Mr. Warner Austin.

Q. For what purpose does the record show?

A. Well, I believe it was charged to executive salaries, if I remember the accounts properly. It is charged to 550.02 which is the index number, and I will tell you in a moment what 550.02 is. That is to general administrative expenses, executive salaries.

Q. Does it say for what period of time?

A. That, I believe, was from the first of January through three and one-half months. There was a period of time there that Mr. Austin did not draw any actual salary, and about the time when he was contemplating leaving for the service, or so forth, they paid him for his services to that date.

Q. Did you make an investigation to determine whether or not he had worked during that period?

A. Yes. Yes; he had performed services, from the word of Mr. Finley and the various people in the office around [862] there.

(Testimony of Jack Marvin Ostrow)

Q. Does the record indicate what type of service he performed those three and one-half months?

A. Well, the accounting records do not indicate the type of service performed. They just indicate the amounts paid for expenses of some sort.

Q. Do you find any record there in your investigation where any other employe or executive of Mr. Finley's was not paid for three and one-half months?

A. No; there was not.

Q. That is the only instance where you find anyone's salary was delayed in its payment for three and one-half months and paid all at one time?

A. Yes, sir.

Q. And that was at the rate of \$1,000 a month, was it not? A. Yes, sir.

Q. Turn to payroll page No. 15, check No. 821. Do you find it? A. Yes, sir.

Q. And what do you find?

A. A check to Mr. Warner Austin for \$500.00.

Q. For what period of time?

A. Well, I presume it is the payroll of the 1st of May; that it would be for the period for the month of April, [863] or half a month. I don't remember at that time.

Q. Doesn't it show there from May 1st to May 15th?

A. To May 15th. I am sorry. I was not reading the—

Q. Is that right? A. That is right, sir.

Q. That was charged there to publicity and advertising, wasn't it? A. Yes, sir.

Q. And not to executive salary?

A. Yes; it was.

(Testimony of Jack Marvin Ostrow)

Q. Take the next one, payroll page 18, check No. 945. Tell me what you find there.

A. A check to Mr. Warner Austin for—well, a gross of \$250.00.

Q. And what date was that for?

A. May 16th to 31st, inclusive.

Q. And what account was that charged to?

A. Salaries-advertising.

Q. Was it publicity and advertising?

A. Publicity and advertising; yes, sir.

Q. The next check, payroll page 22, check No. 1071, what was that for?

A. That was to Warner Austin for \$250.00 from the 1st to the 15th of June, charged to salaries, publicity and advertising. [864]

Q. The next check, payroll page 25, check No. 1187; give me the amount of the check and to whom payable, the period which it covered and the account to which it was charged?

A. It was another check to Mr. Warner Austin for \$250.00 gross, and covering the latter half of the month of June, the 16th through the 30th, charged to salaries, publicity and advertising.

Q. Check No. 1218 on payroll page 26?

A. A similar item to Mr. Warner Austin?

Q. The identical item, wasn't it, \$250.00?

A. \$250.00; yes, sir. I am sorry.

Q. And to Warner Austin?

A. That is right; for the period July 1st to 15th, charged to salaries, publicity and advertising.

(Testimony of Jack Marvin Ostrow)

Q. And then payroll page 29, check No. 1345?

A. An identical item; Mr. Warner Austin for the period the 15th to the 31st of July, charged to publicity and advertising.

Q. Now, that is as far as you acted as accountant there, wasn't it, up to July 31st?

A. That is right.

Q. When you noticed these items did you make any check respecting the services being rendered by Mr. Austin during that period? [865]

A. Yes; I questioned that.

Q. And what did you ascertain?

A. I ascertained that he was being paid half his regular salary while he was on service to the Armed Forces.

Q. Half his salary? A. That is right.

Q. And that was charged to publicity and advertising?

A. Well, the reason it was charged there was that the month prior to the period he left he had started by doing the public relations, publicity and advertising in San Diego, and the last month before he left was also charged to publicity and advertising.

Q. How does the record show that he rendered any services to the company during that period?

A. During the period he was in service?

Q. Yes.

A. Well, the records, as I say, the accounting records do not indicate the services rendered. I can say, however, that I met him in uniform down there on several trips to San Diego at the park.

(Testimony of Jack Marvin Ostrow)

Q. You saw him there?

A. Yes; I saw him there when he was in from Camp Roberts.

Q. Now, keep on the books. You can look at these books and save me some time. Payroll page 31, check No. 1370; tell us what you find respecting that? [866]

A. What was that number, sir? 13—

Q. Check No. 1370.

A. It was a check to Mr. Warner Austin for \$250.00 gross, from August 1st to August 15th, chargeable, I believe, the same way, to publicity and advertising salaries.

Q. Payroll page 33, check No. 1448?

A. It was a similar check to Mr. Warner Austin for \$250.00 gross, covered August 15th through the 31st, chargeable to publicity and advertising salary.

Q. Payroll page 36, check No. 1541; tell us what you find respecting that?

A. Is a check to Mr. Warner Austin for \$250.00 gross for the period from September 1st to September 15th, chargeable to publicity and advertising salaries.

Q. Check No. 1595, page 38 of payroll records?

A. A check to Mr. Warner Austin for a gross of \$250.00 for the period September 16th through September 30th, chargeable to publicity and advertising salaries.

Q. Payroll record No. 41, page 41, check No. 1683?

A. Is a check to Mr. Warner Austin for \$500.00 gross for the period October 1st through October 15, 1945, chargeable to publicity and advertising salaries.

Q. Was there another item there of \$150.00?

A. Yes; it seems to be an item above it. Yes, sir.

(Testimony of Jack Marvin Ostrow)

Q. And who got that money? [867]

A. Also Mr. Warner Austin.

Q. Mr. Warner Austin. He got \$650.00 at that time?

A. Yes, sir.

Q. The next check, No. 1782, October the 15th to November 1st?

A. 1782 was a check to Mr. Warner Austin for \$500.00 gross for the period October 16th through October 31st, 1945, chargeable to the same account, publicity and advertising salaries.

Q. Check No. 1849, payroll record page 45?

A. A check to Mr. Warner Austin for \$500.00 gross for the period November 1st to November 15th, 1945, chargeable to publicity and advertising salaries.

Q. Payroll page 46, check 1914?

A. A check to Mr. Warner Austin for \$500.00 gross for the period November 16th through November 30th, 1945, chargeable to publicity and advertising salaries.

Q. That was charged, I think, to general administration, wasn't it, executive?

A. Was it? As you remember, Mr. Doherty, I am just reading these.

Q. I know that, Mr. Ostrow. I did not want you to unconsciously make an error.

A. Yes; it was charged—I am sorry—it was charged to executive salaries, general administrative expense. Yes, [868] sir. I believe I may have made the same error before, though, Mr. Doherty. I would not be surprised if I made the same error on the one before that as far as the distribution. I believe it might have been charged to general administrative executive salaries.

(Testimony of Jack Marvin Ostrow)

Q. My records show here, the memorandum I have, that was a check of September—I will go back. That the first check of \$3,500 was charged to general administration-executive salaries; and then all the other checks up to and including September the 30th were charged to publicity and advertising; and all checks beginning October the 1st, 1945 to and including December the 31st were charged to general administration-executive salaries.

A. That would probably be right.

Q. And if you have mis-spoken yourself—

A. I believe I called the last few, from October, as publicity and advertising in error. Yes; I believe I have.

Q. Now, take the last one I gave you, which was 1914, from November the 16th to December the 1st, I believe.

A. Yes, sir.

Q. And that was general administration-executive salaries?

A. Yes, sir.

Q. Now, take the next check, 1976?

A. That was to Mr. Warner Austin for \$500.00 for the period December 1st through December 15th, 1945, chargeable [869] to general administrative-executive salaries.

Q. Check No. 2, payroll page 50?

A. That was a check to Mr. Warner Austin for the period December 16th through December 31st, 1945, for \$500.00 gross, chargeable to general administrative-executive salaries.

Q. Turn to check 1119 on September the 6th.

A. Payroll or ordinary check, sir?

Q. Ordinary check.

A. On what date was that, sir?

(Testimony of Jack Marvin Ostrow)

Q. Check 1119. A. Check on September 6th?

Q. September the 6th, check 1119, \$100.00?

A. Yes, sir.

Q. What was that for?

A. Well, all I can do at that date is read the entry here, since I did not do the audit; but it says "Cash, journal passes."

Q. You do not know what that means?

A. Well, I think I do, because I believe it started before I started the auditing. They had an arrangement with the San Diego Journal, which is a local San Diego paper, known, I think, as "The Fun Book Reporter," by which they gave out to certain individuals passes for reduced price for the various concessions and at the ball-room, and through some reciprocal arrangement they paid The Journal for some of the—or they [870] paid out the concessionaires for the cost at the reduced price of these tickets, to redeem these tickets.

Q. While you are on that date or near that date, turn to September the 4th, check 1111? A. Yes, sir.

Q. And to whom was that made payable?

A. Wilma Gowns Company.

Q. In what place? A. Of what place, sir?

Q. Does it say what city?

A. No; not the check record doesn't say, sir.

Q. Do you know where the Wilma Gowns Company is located? A. I do not know.

Q. How much was the check? A. \$135.60.

Q. And what was that charged to?

A. To publicity and advertising-miscellaneous.

Q. And you were not auditing at that time, were you?

A. No; I was not.

(Testimony of Jack Marvin Ostrow)

Q. Go back to August 25th, check 1098?

A. Yes, sir.

Q. To whom was that payable? A. Glen Gray.

Q. How much was it? [871] A. \$227.53.

Q. What is that charged to?

A. Publicity and advertising-miscellaneous.

Q. And who is Glen Gray?

A. Glen Gray, by reputation, is a band leader.

Mr. Doherty: May I be excused half a minute?

Q. While you were auditing there did you have an account with a man named McDevitt?

A. Did I have an account?

Q. Yes, an employee with the company?

A. He was an outside agent.

Q. Do you know what his compensation was?

A. I wouldn't recall. I believe, though, it ran about \$1200.00 a month.

Q. Do you know where he was located?

A. His main office, I believe, is on Sunset and Vine, in Los Angeles.

Q. Did you examine your records as to whether or not there was a month to month arrangement or a contract for over a definite period?

A. I never did see a contract with him.

Q. You never saw a contract? A. No.

Q. In other words, you got a bill and it was O.K.'d and you paid it? [872]

A. I didn't pay it. There was an O.K.'d invoice paid in the records; yes, and there was each one was O.K.'d.

(Testimony of Jack Marvin Ostrow)

Q. When you got an O.K.'d invoice, you checked it against the check and it went through?

A. That is right. He enumerated the services, publicity or advertising or whatever he performed.

Mr. Doherty: That is as far as I have time to check, Mr. Ostrow. So, re-direct.

Re-Direct Examination

By Mr. Christensen:

Q. Do you know who Barney McDevitt is?

A. Yes, I know Mr. McDevitt. I have met him.

Q. What is his business or occupation?

A. Well, he is a publicity man, a promotion man who has put on, I gather, quite a few successful exploitations of ballrooms and general publicity work.

Q. Will you take a look at Exhibit 12-C—no; I beg your pardon. The one as of September, 1945? [873]

A. September, sir.

Mr. Christensen: Yes. Let me see here.

Mr. Doherty: I think it is Exhibit 12-F.

Mr. Christensen: Let me see the different ones. I didn't have them here.

The Clerk: 12-D.

Q. By Mr. Christensen: Let me withdraw the question pending and let me invite your attention to Exhibit 12-A here, in which there is an item I want to ask you about. On Schedule B-1 of Exhibit 12-A there is an item here under expenses which says, "Entertainment Fees, \$7,100.00." Do you know what that was for?

A. Yes, I can recall the nature of the item was the individual acts hired in addition to the bands to appear at the ballroom. I believe this was the period up to

(Testimony of Jack Marvin Ostrow)

February 28, and I remember, for example, for the opening they had Allan Jones and Ella Mae Morse there in addition to, I think, the Henry Busse band, which opened the ballroom.

Mr. Doherty: I will stipulate, Mr. Christensen, that the entertainment fees, \$7,100.00, was a part of the entertainment there in the form of acts. I mean I only referred to that as a cost of the show.

Mr. Christensen: I see. I didn't want any misunderstanding about that.

Mr. Doherty: No, no. It is right under the bands. The [874] bands are above it, and then this item is immediately under the bands.

Mr. Christensen: Yes.

Q. By Mr. Christensen: Do you happen to know what the account was with Wilma Gowns?

A. No. That was a period subsequent to my engagement.

Mr. Christensen: That is all I wanted to ask you, sir.

Re-Cross Examination

By Mr. Doherty:

Q. There is one other item I do want to call your attention to while you are on the stand that I overlooked.

A. Yes, sir.

Q. June 14th, check No. 854. A. Yes, sir.

Q. What was that check for, and in what amount?

A. It is written for \$1,000.00, rent of Larry Finley while in Los Angeles.

Q. Did you investigate what the rent consisted of?

A. I don't follow that.

(Testimony of Jack Marvin Ostrow)

Q. I mean, what item of rent was it for, for Mr. Finley, while in Los Angeles, \$1,000.00?

A. He rented a home here for several months.

Q. He had a home here?

A. Well, a place to live, for his wife and family, yes.

Q. That was in June, of 1945? [875]

A. That is when he paid the check, yes, sir.

Q. And for what period of time was the rent?

A. I believe it was for either June and July, or July and August, or something of that nature; covered several months, though.

Q. Don't your records show?

A. No. It was charged directly to the traveling expenses, without a breakdown of the rental period. The supporting vouchers would show the period.

Q. Would it show to whom the rent was payable?

A. It does not here.

Q. To whom was the check made?

A. That is the error in the books. It does not show the payee. It just gives the explanation. I imagine the check would have the payee on it.

Q. It just says, "Rent of Larry Finley,"—

A. Yes, sir.

Q. —\$1,000.00? A. Yes, sir.

Q. June 14, 1945? A. Yes, sir.

Q. You were auditing at that time, were you not?

A. Yes, sir.

Q. And Mr. Finley had a home in San Diego?

A. Yes, he owned a residence in San Diego at the time. [876]

(Testimony of Jack Marvin Ostrow)

Q. At that time he was connected with the Casino Gardens, and you knew that, didn't you?

A. I don't believe he was at that time, no. I don't know when he started at the Casino Gardens. I didn't take care of the Casino Gardens venture.

Q. You wouldn't say he was connected with the Casino Gardens, then, during June, July and August of 1945?

A. I really couldn't say when he started Casino Gardens. I don't know, sir.

Q. To what account was the \$1,000.00 charged?

A. Traveling expenses, I believe. Yes, it was charged to traveling expenses.

Q. Did you verify the voucher on that that justified you in charging the traveling expenses with a check to Mr. Finley for \$1,000.00 for rent while he was in Los Angeles?

Mr. Christensen: You didn't mean to say "To Mr. Finley", did you, Mr. Doherty?

Mr. Doherty: Well, the record of the ledger says, "Rent of Larry Finley while in Los Angeles."

Q. By Mr. Doherty: It was payable to cash, wasn't it?

A. No, I don't believe it was payable to cash. I don't remember who the payee was. I remember making the bank reconciliation, and seeing the voucher, and asking about it, and I received an explanation at the time from the people involved as to its nature. [877]

The Court: Are those canceled checks here?

The Witness: They are not in this valise. I don't know.

(Testimony of Jack Marvin Ostrow)

Q. By Mr. Doherty: Did you make any computation during the month of May or June to see whether any of these hotel bills at the Beverly Hills Hotel and Beverly Wilshire Hotel were charged to the Casino Gardens operation?

A. I had no way of knowing anything about the Casino Gardens operation, sir.

Q. All you know is that invoices came in from the Beverly Hills Hotel and the Beverly Wilshire Hotel in the amounts I have asked about and that checks were issued in the amounts of the invoices? A. Yes, sir.

Q. I will ask you about one more thing, and it will save Mr. Hansen considerable time. Turn to your ordinary expenditure ledger for September 4th. Have you it there? A. Yes, sir.

Q. Check No. 1154, the amount of the check, and to whom payable?

A. It is a check for \$300.00, payable to cash.

Q. No. 1155, the same date.

A. It is in the amount of \$160.76, chargeable to the Waldorf-Astoria.

Q. No. 1156, the same date.

A. A check for \$400.00, payable to cash. |878|

Q. So that on that date there were two checks to cash for \$700.00, and one to the Waldorf-Astoria for \$160.76; is that right?

A. That is what the records show, yes, sir.

Q. To what account were they charged, these three checks? A. Traveling expenses.

Mr. Doherty: I think that is all.

I will call Mr. Hanson for just a couple of questions and see if he has his computation complete yet.

EUGENE A. HANSEN,

called as a witness by and on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-Examination (Continued)

By Mr. Doherty:

Q. Have you completed that computation, Mr. Hansen?

A. No, I was leaving it up to Mr. Ostrow to complete. He had started working on it, so I was going to leave it to him to complete.

Mr. Doherty: May I ask the court's indulgence to state that if we have a chance to get the books back and check some more items, then if it is necessary to call Mr. Hansen and Mr. Ostrow, we will not delay the case. In the meantime we can be moving along. Then I could recall them and ask them [879] about certain items, if necessary. I do not want to impose on the court's time. The noon hour is a very brief time in which to examine books.

The Court: Do you have other witnesses, Mr. Christensen.

Mr. Christensen: No, I had not planned on it. You want to finish your cross-examination of Mr. Finley, don't you, Mr. Doherty?

Mr. Doherty: I think the auditors have covered it, Mr. Christensen. I think the auditors have covered what I would ask Mr. Finley.

Mr. Christensen: All right.

Mr. Doherty: In other words, the books are the best evidence.

(Testimony of Eugene A. Hansen)

Re-Direct Examination

By Mr. Christensen:

Q. Let me ask you one question. Do you know about the Wilma Gowns account, the charge?

A. Not right offhand. When was that check drawn, that Wilma Gowns check?

Mr. Doherty: The check, Mr. Hansen, if I may interrupt, was No. 1111, September 4, 1945, Wilma Gowns Co. My notation says, "New York, \$135.60."

The Witness: That may have been in connection with the Miss America contest. I think it was.

Mr. Doherty: You have no independent knowledge of it? [880]

The Witness: Well, not independently, no, but I do know, just from memory, that there was an individual from San Diego in the contest, sponsored by Mr. Finley, and she went back to the East to participate in the contest back there, after winning the preliminaries in San Diego.

Mr. Doherty: That may be corroborated, Mr. Hansen. To refresh your memory, I just read off some checks indicating that Mr. Finley was in New York at the Waldorf on September 4th, because check No. 1155, which I have just read off to Mr. Ostrow, for \$160.76 was to the Waldorf-Astoria, and there were two checks to Mr. Finley on the same date totaling \$700.00, on September 4th, and this Wilma Gowns Company check is also September 4, 1945.

The Witness: Well, I think if we had the invoices you would find that was in connection with the Miss America contest.

(Testimony of Eugene A. Hansen)

Mr. Doherty: I don't know. I am just inquiring.

The Witness: Yes.

Q. By Mr. Christensen: You recall that they had a contest there in the ballroom to pick Miss San Diego?

A. Oh, yes. Miss Phyllis Mathis was the winner of the contest out there, and she went back East.

Q. And the prize was the sponsorship in the Miss America contest? A. That's right. [881]

Q. Incidentally, she came in second in the United States? A. That's right.

Q. A part of the prize offered was three gowns, wasn't it?

A. Yes. I recollect hearing talk in the office concerning that, what the prizes would be, but I didn't see anything in writing, or anything like that. It was just conversation among those down there. That was in the office down there, that that was a part of the prize that she won.

Mr. Doherty: It is time for a recess, I believe.

Mr. Christensen: Yes.

The Court: We will take our recess now, ladies and gentlemen, for a few minutes. Remember the admonition and keep its terms inviolate.

(A recess was taken.)

The Court: The record shows that the court convenes without the jury being present, and they are all without the presence of the court, and, also, that the manner of convening is at the request of counsel for the plaintiff.

(Thereupon the following proceedings were had outside the hearing and presence of the jury:)

Mr. Christensen: That is correct, your Honor, and it is for the purpose of, and I now move the court to permit me to file an amended complaint in this matter, the amendment being [882] solely to conform to the proof, and to show the parties plaintiff as being Larry Finley and Miriam Finley. The only new allegations are the fact of the partnership and the compliance with the provisions of the Code relative to publication. It presents no new issue, and I believe that it should be done by reason of the evidence given by Mr. Finley.

The Court: Let me see it.

(The document referred to was handed to the court.)

Mr. Christensen: I have heretofore given counsel for the defendants copies of the complaint, and have filed one with the clerk and one with the court. [883]

The Court: This document that is proffered here, there is no jurat. There is a seal on it. There is no verification of it.

Mr. Christensen: Mr. Finley can verify it right now before the clerk, if he will take his verification.

The Court: What is the attitude of the defendants in the case.

Mr. Collins: If the court please, the attitude of the defendants is to resist this application for the filing of an amendment to the complaint, now nominating two plaintiffs in lieu of the one who previously stood as the sole plaintiff in this action.

I appreciate that there may be decision for the court's exercise of discretion in a matter of this kind in admitting new parties plaintiff; but I do submit that this is

not a case for the court to properly exercise that discretion in favor of the plaintiff.

We have here a case which was filed on March 20, 1945, in which the plaintiff, Larry Finley, under oath very emphatically declares he is the operator of the Mission Beach ballroom. Thereafter, in this case, issues were framed, pre-trial conference was had, the deposition of the plaintiff was taken, interrogatories were submitted, motion for a summary judgment was made, and at no time, at any stage of the proceedings up to the point where plaintiff is about to [884] rest his case, does he come into this court and ask that another plaintiff be joined with him in this action.

This is an action in tort, if the court pleases; it is a statutory action. No right would exist in favor of this plaintiff were it not for the statute. The right is one which must be observed and must be enforced strictly in accordance with the statute.

The plaintiff, according to his own testimony and that of his accountants, knew that he had a copartner in this enterprise. It was not something which was developed since the trial or since the filing of the suit. It was something which was in existence as early, I believe, as 1940 or 1941. It was not an informal arrangement; it was a very formal one, declared, if you please, by Articles of Copartnership between this plaintiff and his wife.

So it is not a case of excusable neglect on the part of the plaintiff. On the contrary, it is a wanton disregard for his responsibilities in the premises, for he is going to the statute in a suit to enforce a tort in which he is only a partial owner. He does not, as he might possibly have done, represent to the court that he was suing on

behalf of the partnership. He states in clear, unqualified, unequivocal terms that he, Larry Finley, the plaintiff, is the operator of the Mission Beach ballroom.

I submit that it is not a case in which the court may [885] properly exercise its discretion in favor of the plaintiff.

Defendants are left, taken nigh to the point where the case goes to the defense, with the burden of the defense in going forward, and then he asks this court to include his wife as plaintiff.

As I say, it is a tort action; it is an indivisible tort; and he should have known, at his peril, who were the parties that were injured. He states that he was injured in \$1,000,000. Now, is his wife injured in the sum of another million dollars? The evidence adduced here in the case is an injury to him, to his business.

I submit that the motion should be denied, or the application.

Mr. Christensen: Your Honor, I only wanted to comment on this fact. That under our laws of California, his earnings and property would be community property, in any event. This is not somebody new, but his own wife.

I want to say this: That, to a limited extent, perhaps, the fault is mine. I had the partnership agreement. I read it, and I did believe that it constituted a partnership in the Mission Beach ballroom. The partnership agreement does not, by its terms, include that. As a matter of fact, it limits it to the business of sales promotion and as merchandizing and business counsellors and advisers.

However, I find that apparently they have set up the books [886] to show a partnership agreement. Mr. Finley is not a lawyer. He says, "Well, we did operate as

partners down there by reason of our acts and verbal understandings."

I have here, if the court would like to see it, the partnership agreement of which I have just spoken. It was entered into as of the first day of March, 1944. Yes; it says, "made and entered into this 1st day of March, 1944," and signed by both Larry Finley and his wife.

The Court: As to the allegations of the proposed amended complaint other than those relating to the parties, are they precisely and exactly the same as those in the original complaint?

Mr. Christensen: I believe that is the case. Mr. Jaffe prepared it. That was my instructions to him in preparing it, and a single reading of the complaint to me shows it is the same.

The Court: Mr. Jaffe, did you compare the original complaint with the proposed amended complaint?

Mr. Jaffe: No, your Honor, I did not, only I know that the stenographer in preparing the amended complaint copies exactly from the original complaint.

The Court: Are you able to state to the court that the allegations are precisely and identically the same, with the exception of the adding of the new party, the wife of the plaintiff, Mrs. Finley? [887]

Mr. Jaffe: On my just reading, your Honor, I would say so; yes, sir.

Mr. Christensen: I concur in that, and the difference in all of the paragraphs, except the first one, is merely grammatical, where it says, "Plaintiff is" changed to "Plaintiffs are".

The Court: Yes.

Mr. Christensen: That is right. With that single exception, I believe that the complaint is identical,—I should say those exceptions.

Mr. Doherty: I want to make one suggestion merely to correct counsel. Community property in California is not partnership property. We have a Code section which says partnership property is not community property.

Mr. Christensen: Speaking of a layman's view of it, it being their joint property, Mr. Doherty. If I mis-spoke myself, that is what I intended to say.

The Court: I do not know as the defendants are prejudiced by this proposed amendment. I do not see how they can be. Rule 15 of the Rules of Civil Procedure relating to amendments to conform to the evidence, and subsection (b) reads:

“Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised [888] in the pleadings. But amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a con-

tinuance to enable the objecting party to meet such evidence.

“(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.”

Aside from the question, which is not pertinent to this motion, as to the liability, if any, to either the present plaintiff or to the two proposed plaintiffs or to either of [889] the two proposed plaintiffs, I do not see how the proposed amendment can prejudice any of the defendants.

The only phase of the case that would operate in illuminating the question is the observation of the Second Circuit Court of Appeals in *Connecticut Importing Co. v. Frankfort Distilleries*, 101 Fed. (2d) 79. There, there was an action under the private right secured by the Sherman Anti-Trust Act, in which the plaintiff recovered a judgment, and there were two appeals, cross-appeals. In that case the court restricted the element of damage to the time of the filing of the complaint, and the damages were accordingly awarded. The defendant appealed on the merits and the plaintiff appealed from that portion of the court's charge that restricted the damages to those which accrued and which had been established prior to the commencement of the action. The Court of Appeals, in discussing that brief, stated:

“Neither do we find any error on the plaintiff's appeal. The recoverable damages were only those sustained by the plaintiff from the time the cause of action accrued up to the time the suit was brought. *Frey & Son, Inc. v.*

Cudahy Packing Co., D.C., 243 F. 205. Damages which accrue after the suit is brought cannot be recovered in the action unless they are the result of acts done before the suit was commenced. *Lawlor v. Loewe*, 235 U. S. 522-536. Here the plaintiff's damages, if any, after the commencement of the suit were [890] due to continued refusal or refusals, in furtherance of the conspiracy, to supply it with the Frankfurt products after that time. The unlawful acts which would give rise to such damages had from their nature to be committed in carrying out the conspiracy after the suit was brought. It would be impossible to predict how long such a conspiracy would remain in existence or how long the refusal to sell to the plaintiff would continue and, even if such damages could, in a sense, be treated as the result of refusing to supply before suit was brought, they would be purely speculative."

Now, in the case at bar, entirely independent of a factual question which should be submitted to the trier of facts, the evidence in the record at this time includes alleged transactions, negotiations, conversations, and activities that were explored fully in the state of the case that exists at this time. There is nothing excepting the mere question of the right to damages, and that only insofar as the point of time is concerned. That may be irrelevant under the present state of the action.

There is a good deal of doubt as to whether the amendment is necessary. The matter might be controlled by instructions, and probably will be so controlled. But as far as any prejudice to the defendants is concerned, I cannot see that [891] there is any.

It is true, there has been delay, there has been ample opportunity for the plaintiff to have apprised himself.

There were pre-trials; there was a motion for summary judgment; there were depositions extensively taken, and the matter of his information was there. But as far as prejudice as to the defendants is concerned—and that seems to be the spirit of this Rule—the spirit of the Rule is that the court should act so as to determine a litigation upon its merits, and not to project objections into the case that are not meritorious, even though they may be hyper-technical.

For those reasons, the motion to file the amended complaint will be granted.

Mr. Warne: May it be deemed that the answer filed to the original complaint may stand as the answer to the amended complaint in all particulars which make the issues presented to the court at this time?

Mr. Christensen: Yes, your Honor.

The Court: So understood.

Mr. Christensen: The only remaining allegation is that of the publication, that being a matter of public record, I assume we will not be required to present the actual certificate.

The Court: I think that Major Doherty elicited that fact in his examination, that there was a certificate filed. [892]

Mr. Doherty: I think there should be this further understanding, if the court please: You now have a partnership as plaintiff. We should have the understanding that we are not going to have any of the new parties plaintiff coming in with any new testimony.

The Court: Oh, no.

Mr. Doherty: Or any new conversations which we are not prepared to meet at this late date.

Mr. Christensen: That is understood, sir.

The Court: That was the basis of the ruling on it as announced by the court from the bench, otherwise there might have been some prejudice shown. I do not see how there could be any prejudice to the defendants.

Mr. Doherty: The only thought I had in mind, your Honor—and I am most liberal and I am not running counter to your ideas—is paragraph VIII, which is the conspiracy charge, that the defendants deprived, now, the “plaintiffs” of these things.

I have no knowledge that we could develop any new facts, but if she had been a plaintiff from the beginning, we would probably have taken her deposition and it is possible that we might have developed facts that we were not able to develop in this case. I say, it is only a possibility. I have no knowledge or any independent knowledge, and I do not know whether Mr. Warne has, but it is a clear type of case [893] of conspiracy; in other words, knowledge that Mr. Finley might have that Mr. Finley did not have respecting the procurement of name bands and their availability and things of that sort.

That is what I had in mind as a possibility of prejudice which might not exist in an ordinary action.

The Court: I do not see how that could be, Major. You went into all of these transactions very carefully and meticulously. The plaintiff was required to lay the foundation of these conversations which he did lay, and I do not see how the defendants can be prejudiced. We are not going to re-open this case. One of the purposes of the ruling is to conform to the Rule which I just read, which has a purpose of terminating litigation, instead of prolonging it; and that is one of the reasons why these New Rules have been so effective in the administration of justice in the Federal Courts, instead of

adhering to the technical rules which applied prior to the New Rules of Federal Civil Procedure. We were constantly confronted with trials including litigation that took years to get out of the courts.

I do not think there is any prejudice shown to any of the defendants in the case.

Mr. Christensen: The plaintiffs rest.

Mr. Doherty: I did want to get the computation from these auditors. [894]

The Court: Yes. We had better have the jury back.

Mr. Christensen: Oh, I forgot all about that.

The Court: Bring the jury down.

Mr. Doherty: Before you do that, your Honor, are we going to be permitted to make the motion for a directed verdict, or has your Honor about concluded it on the examination of the evidence and the law that was submitted?

The Court: I am not going to announce any position until the appropriate time comes. I have a very decided view on one of the defendants in the case; but as to the others, I am not going to preclude any argument that you want to make, providing it is limited within reasonable scope. I think, probably, that as to one of the defendants, there is no case so far. I do not know what your evidence will show when you finish the examination of these auditors.

Mr. Doherty: May I ask the auditors a question? Have you gentlemen got those computations?

Mr. Ostrow: I am afraid we can't quite finish them here. I do not have them all. Can we give them to you approximately?

Mr. Doherty: May it be understood, then, your Honor, that they may file those out of order, rather than delaying the proceeding for that purpose?

The Court: Was that all you wanted to examine them about when they prepared that statement, or did you want to [895] examine them orally?

Mr. Doherty: Just file that statement; that is all I will examine them on, your Honor, and they might file that out of order and pass it in and we can have it read to the jury, very briefly. I will check it over with Mr. Christensen, and if we agree on what is in it, then it may go in without any witness being called.

The Court: I want to hear what you have to say about your motion for a directed verdict, and hear it in the absence of the jury, of course. Probably we could excuse the jury now until 10:00 o'clock tomorrow morning, and devote the rest of the session, about 35 or 40 minutes, to hearing what you have to say on your motion for a directed verdict, with the understanding that the ruling will be made at the conclusion of all the evidence in the case in chief.

Mr. Christensen: Yes, your Honor.

The Court: Very well, we will call them down and let them go home, Mr. Bailiff.

Have you any idea how much longer it will take, assuming that the case goes on with the jury?

Mr. Doherty: Mr. Warne knows that better than I do.

The Court: I just wanted to inquire because the calendar is getting a little bit crowded.

Mr. Warne: I believe we can conclude the proof of the defense certainly by Friday, that is, all evidence through [896] Friday.

Mr. Jaffe: Did you say "Friday"?

Mr. Warne: Correct.

(Further proceedings were had in the presence of the jury in the courtroom.)

The Court: The record shows that all the jurors are present, gentlemen, is that correct?

Mr. Christensen: Yes, your Honor.

Mr. Doherty: Yes, your Honor.

The Court: Ladies and gentlemen, we are going to excuse you until tomorrow morning at ten o'clock. We have some matters that we will not have the benefit of your association in in this case. Be here in the morning at ten o'clock, please, and remember the admonition in the meantime and keep its terms inviolate.

Mr. Doherty: Your Honor, may I interrupt a moment? Counsel has just called my attention to an exhibit which I did not introduce. It is very brief, and I will not even read it to the jury. Are you agreeable to its being introduced?

Mr. Christensen: Oh, yes.

The Court: It may be received and marked as one of the defendants' exhibits. What is it?

The Clerk: Defendants' Exhibit L.

The Court: Let the record show that after the court [897] announced that the jury would be excused, that this proffer came up and that the reception of that—what is the number of that, Mr. Clerk?

The Clerk: Defendants' Exhibit L, your Honor.

The Court: —was in the presence of the jury, while they were present and before they left for the jury room.

I think we have everything in the record at this time, have we?

Mr. Christensen: I believe so, your Honor.

The Court: Then you will be excused, ladies and gentlemen, until ten o'clock tomorrow morning. Remember the admonition and keep its terms inviolate.

(The document referred to was marked as Defendants' Exhibit L and was received in evidence.)

(Whereupon, the jury retired from the courtroom and further proceedings were had in their absence.)

The Court: The record shows that all the jurors are without hearing. Proceed.

Mr. Christensen: Your Honor, may I at this time move the dismissal of this action as against the defendant Stein? I do not believe I have made a case against him.

The Court: That is what I was going to say.

Mr. Christensen: The motion is granted?

The Court: Yes, Mr. Christensen. There wasn't any evidence against him at all, not a scintilla. [898]

Mr. Collins: If the court please, at this time I should like to hand up to the clerk a motion for a directed verdict in behalf of each defendant, together with a memorandum of points and authorities in support thereof.

Mr. Christensen: Have you an extra copy, Mr. Collins?

Mr. Collins: I gave one to your associate counsel.

Mr. Christensen: Thank you. [899]

The Court: I have read the motion, Mr. Collins.

Mr. Collins: Very well. I shall not undertake to repeat the formal statement of the motion. I shall address myself, if the court please, to the three or four main points on which we, of the defense, feel that we are entitled to a directed verdict at this time. They are: the lack of interstate commerce in musical entertainment, the lack of any restraint of interstate commerce, and, more particularly, the lack of any unreasonable restraint of interstate commerce, the lack of proof of any conspiracy or any combination, or any type of concerted

action to restrain interstate commerce in musical entertainment or to monopolize such commerce; and the fact, affirmatively shown, that the subject-matter in which the defendants dealt, and their alleged co-conspirators dealt, was not a thing or article, or as the Code denominates, a commodity of interstate commerce, and that, therefore, there is no basis, no jurisdictional basis for this court or for any jury to award damages. And, latterly, we contend that there has been no proper evidence, demonstrable evidence, to show that the plaintiff, or, rather, these plaintiffs have been damaged in any demonstrable monetary amount as a result of any combination, conspiracy, or concerted action of any type on the part of the alleged conspirators.

Now, proceeding to the first point, that there is no interstate commerce involved in the particular aspect of the [900] case that is presented here, I do not have the boldness to assert to this court, and I disclaim any such contention, that Music Corporation of America is not engaged in interstate commerce. On the contrary, it must be conceded that it is. But I would distinguish engagement in interstate commerce on the part of an entity with restraint of interstate commerce in a commodity. I would like to have that point very clearly understood.

We admit that Music Corporation of America engages in interstate commerce, uses the instrumentalities of interstate commerce, and maintains offices in states other than this one, and it does effect, through transmittal of messages by phone, et cetera, its business with those various offices. But we do assert it does not bring any commodity within the intendment of the Sherman Anti-Trust Act, which is the subject-matter here, or which is capable of being restrained within the intendment of that law.

That leads to a consideration of Section 15 of Title XV of the United States Code, which states, in clear, explicit and plain language that the labor of a human being is not a commodity of commerce.

Now, let us consider the relationships which obtain here. We have Music Corporation of America, which in the complaint is alleged to be the personal representative and the employment agent of personnel, persons in the entertainment industry, [901] including leaders of name bands. The evidence demonstrates that Music Corporation functioned as the representative, as the counselor, as the agent, as the advisor of band leaders in the matter of the procuring of employment in dance halls and other places of entertainment.

Let us for the moment consider what would be the situation if Music Corporation was not in the picture at all. We would have a band leader negotiating directly with the operator of a ballroom with a view to having the leader and an orchestra or band perform for the dance hall or other place of entertainment. The leader could agree to work or he could refuse to work. He could stipulate certain terms as to the time he would play, as to whether he would follow another band in the town or in the ballroom. He could refuse to do all of these things. He could stipulate whatever price he would to the operator. He could charge one operator one price, and another operator another price.

Now, we introduce Music Corporation of America into the picture. What additional thing does it do? The answer is, "Nothing." It represents that leader, it functions for him and in his stead and in his behalf, and the court is familiar, I am sure, with the anti-trust cases, not cases culled from other fields of law, but anti-trust cases

which hold that when a laborer, a worker, an artisan, or a group of them, are working in self-interest and alone, they are not subject to [902] the provisions of the Sherman Anti-Trust Law, or any other anti-trust legislation. That has been established in the Hutcheson case. It has been reaffirmed in *Hunt v. Crumboch*, decided last June by the Supreme Court of the United States, and also in the *Bradley v. Electrical Workers* case. I might say in the *Bradley v. Electrical Workers* case the court held there was an improper combination there, but it was between, not the working man and the union or his bargaining agent or his representative, such as M. C. A.; it was with the employers, it was with the fabricators of electrical products, who themselves were engaged in commerce, and the court in that case stated that it found a combination within the provisions of the anti-trust laws, but stated that if it were dealing merely with the contractual relations between the union and an employer, it would not say, it would assume that such a contractual relationship was legal. And that is a very significant admission and statement on the part of the court, and it is very pertinent to this situation, because that is all we have here, is the relationship between the worker, the band leaders, and their agent for the purpose of obtaining employment.

The evidence, all of the evidence, viewed most favorably from the point of view of the plaintiffs in this case fails to show that that agent did anything beyond what was its appointed function on the part of the band leaders whom it [903] represented.

Now we come to the contracts which are involved in this case. There are two introduced in evidence. I believe they are Defendants' Exhibits E and F; two contracts

between Music Corporation of America and its alleged co-conspirator, Wayne Dailard. The first of those contracts was a letter form of agreement made in the year 1941, I believe, when Mr. Dailard was launching his first enterprise at Pacific Square in San Diego. That agreement committed Music Corporation of America to deal with Mr. Dailard on certain terms, namely, that they would give him or it would give him the first right of refusal, to be exercised within a period of forty-eight hours. I shall come back to that agreement immediately, but I should like to mention the second agreement. Although it was a more detailed and a more formal document, it was, in substance, no different on that point than the first agreement. It committed Music Corporation of America to give Dailard the first right of refusal. Dailard, in turn, agreed to buy a certain percentage or certain number, or, not to buy but to engage through Music Corporation of America a certain percentage or number of bands that he might use at his business location.

Now, as I understand it, the plaintiffs in this case do not contend that either of those contracts are illegal. On the contrary, I distinctly recall a statement or argument at [904] the motion for summary judgment that conceded that the agreements, standing by themselves, were legal contracts, and the laws and cases are to the same effect. Certainly, a band leader, or, Music Corporation of America, as the employment agent of a band leader, has the right to choose with whom he is to deal. And if we stop there, there is nothing wrong, there is nothing illicit, there is nothing within the condemnation of the Sherman Anti-Trust Act. It is the right of an American tradesman, it is the right of any person, the right of a working person, to elect to deal or not to deal

with any other person, and that is what we have here. That is what those two agreements purport to be. They are nothing but bargaining relationships between a dance hall operator and Music Corporation of America as the employment representative of band leaders. No more can be read into them than that, and the evidence in this case has failed to overcome what might have been, or has failed to establish what might make them an instrumentality in a combination, namely, that they were made or that they were enforced or that they were operative with the intent of the parties and for the purpose of restraining interstate trade in entertainmmt.

Let us examine that for a moment. The evidence is uncontradicted and unequivocal to the effect that when the agreement between Music Corporation of America and alleged co-conspirator, Dailard, was made in 1941, Mr. Finley was not [905] only not at San Diego in a dance hall, he was not in the amusement business at all. He had not loomed upon the horizon, so that by the widest stretch of the imagination it could not be said that the defendants and Dailard had in mind any intended restraint against Finley, or against any other unidentified operator of a ballroom in San Diego, or elsewhere.

The court will recall the testimony that Dailard saw the opportunity for a first-class ballroom being established at San Diego, and he wanted assurances that after he launched such a venture, which entailed considerable expense and risk to himself, that he would have the assurance of entertainment to go into the ballroom, and it was for that reason, motivated by those considerations, that he went to Music Corporation of America, and after some negotiation it did agree that he would be furnished such bands.

Now, we come to the second agreement, and I say the same of it as I did of the first engagement. That anteceded the presence of Mr. Finley in the San Diego area, and his activities in ballrooms in San Diego. It was made, I believe, in the month of May, 1944. It was a clear contractual bargaining arrangement between the representative of the band leaders, who had their services to commit, and the operator of a going business to receive that type of entertainment. It did nothing more than give Mr. Dailard the right of refusal for twenty-four hours. I say that those agreements are clearly [906] innocuous; under the law, they are not only permissible, they are the recognized requisites of business conduct today.

As the court pointed out, the Supreme Court of the United States pointed out, in the American Tobacco Company case some thirty-five years ago, and in the Standard Oil cases, if a literal interpretation is to be given to the Sherman Act, it would be impossible for American business to function today, because every bargaining relationship between persons does entail restraint, and the court, in its historical cases, declared that the word "reasonable" must be read into the language of the Sherman Act; and from that day to this, with the exception of variance, it is a recognized, implied term of the statute that before any combination or any agreement falls within the censure of the law it must be an unreasonable one.

I assert that there is no evidence whatever in this case to establish either that the agreements between the defendant, Music Corporation of America, and Dailard, were unreasonable or that they were made or enforced for the purpose or with the intent or with the direct or

proximate result of injuring the plaintiffs Finley in the conduct of their ballroom operations at San Diego.

Now, on the aspect of this argument that there is no commodity of commerce that has been restrained, I should like to consider briefly the essential subject-matter, as plaintiffs [907] have elected to place it in this case, namely, name bands. I submit that in view of the evidence put on through the witnesses of the plaintiffs, and through the testimony of the plaintiff, Larry Finley, himself, that there is no clear, definite, definable, tangible thing known as a name band. It is a euphemistic term, it is an elastic term. It has been distorted here to the point where we get great big name bands, big name bands, name bands, semi-name bands, top bands. It runs the whole gamut of the band boys. So how could a jury, committed with the responsibility of determining a question of fact, say that there has been a restraint in the matter of providing name bands or in preventing the plaintiffs Finley from obtaining name bands?

Now we come to the point of the proof as to the participation in an unlawful combination or conspiracy, or participation in concerted action on the part of the three defendants who remain in this case, the corporate entity, Music Corporaion of America, and the individual defendants Barnet and Bishop. The court has already declared itself, and the plaintiff has acted accordingly, in dismissing as to the defendant Stein. I submit that there is no evidence worthy of submission to this jury that the corporate entity, Music Corporation of America, has participated in any unlawful conduct. There is evidence, sparse though it is, that the defendant Bishop made certain statements of intent and of [908] purpose favorable

to the alleged co-conspirator, Dailard, and adverse to the position of the plaintiffs Finley, but there is no evidence showing, even reasonably, that Bishop was acting upon the direction of superior officers of Music Corporation of America, or that he had authority, on the part of his corporate principal, to engage in the activities which were so produced in evidence.

The evidence, as it stands now, is that Bishop in those particulars was acting solely by himself. Likewise, there is no evidence that the defendant Barnet committed any act that could measure up to participation in an unlawful combination or conspiracy. As I recall the testimony, the most he did was by way of negation. He was called upon, called over the phone by Mr. Finley, and asked if he had done anything, if he had seen his attorneys yet and if he had decided to give him the bands, and the thing sort of dissolved itself after a period of time, and nothing came of it. It is true that he is asserted to have said that there is a contract with Dailard and it is going to be tough to get around it, but I think we can. Now, that is the strongest evidence, I submit, of any participation on his part in any irregular or improper conduct, if that may be so denominated, and I submit it cannot be. It is merely a man reflecting—his reflection, if you please, as to whether he would breach one contract in order to provide service to another party. I submit that if he had [909] accommodated himself to the demands of Mr. Finley, he might then have been guilty, according to the plaintiffs' theory, of a conspiracy with Finley, as distinguished from one with Dailard, because Finley was then asking for something that Dailard then had. So if it was a conspiracy he engaged in with Dailard, we

submit plaintiffs claim damage because he refused to go into a conspiracy with the Finleys.

Now we approach the question of damages. The court has anticipated one point which we, of the defense, believe to be sound and applicable in this case, and that is the doctrine stated by the court in the Second Circuit in *Connecticut Importing Co. v. Frankfort Distilleries*, which is reported at 101 Fed. (2d) at page 79. As the court read, and I shall not repeat the language from that case, the damage to which a plaintiff is entitled by reason of the conduct of a combination which has injured him in his business is the damages which he has suffered up to the time the suit is filed, unless it is shown that there has been a continuance of the acts from that time forward. I submit that the evidence in this case does not show any such continuance. It does not show at all that there was any combination before, but certainly, if I may assume for argument's sake that there was questionable conduct, it does not show that that continued from the time the suit was filed. There was a first refusal, or, rather, it wasn't a first refusal, it was an inability, if you may [910] call it that, on the part of the plaintiff to obtain bands through Music Corporation of America for his opening, and he stated that he had suffered no damages up to that time, and the acts of which he complains thereafter certainly do not measure up to any illicit combination or conspiracy. In that connection we have the issue which, I submit, is improperly injected in here. It is not within the framework of the pleadings. That is, of monopoly. They allege here a conspiracy to restrain trade, but there has been a lot of loose talk about monopoly, about Music Corporation of America controlling 90 per cent, or 95 per cent, or most, or the best of the

bands. I think plaintiff's own evidence is the best refutation of that argument that there is. Plaintiff had as big name bands as are known to exist, in the persons of Tommy Dorsey and Jimmy Dorsey, and on his opening night he had admittedly a name band, Henry Busse; and he has access to, and in so far as the record shows, the exclusive access to the William Morris represented bands. The court will recall the letter which the representative of that organization submitted to Mr. Finley for incorporation in his bid to the City Council of the City of San Diego, in which they stated, "We would like to deal with you on an exclusive basis," and then they proceeded to enumerate the bands under their representation. Likewise the other agency, the General Amusement Corporation, enumerated those which it had, and Frederick [911] Brothers. So that, according to plaintiff's own case, as presented here, there has been no monopolization of bands, there has been no restraint of bands.

Now, if I may get back to these agreements that were enforced one time between the Music Corporation of America and Dailard. The court will recall the evidence that Mr. Dailard terminated all relationship with the Pacific Square Ballroom as of July 1, 1945, and from that date he has had no connection whatsoever with the operation, and that Mr. Stutz is a free agent so far as the previous contracts of Dailard were concerned. So that there is not even any written contract here that might serve as the basis for the claim that there was an unreasonable restraint of trade through the medium of contractual relationships between the parties.

On this element of damage again, I submit that there has been a great variety of evidence, a great variety of

figures. The court has been most indulgent with the plaintiffs in submitting whatever type of evidence they thought might establish their claims, but a great amount of this evidence, and the evidence which they hope to serve as the connecting link between injury and dollars, is evidence relating to the Pacific Square Ballroom.

I do not have it before me at the moment, but I know from memory the case of *Ball v. Paramount Pictures*, I believe it was, in which the plaintiff sued the larger producers and [912] distributors of motion pictures and sought to effect recovery for the losses sustained in his theatre, and he sought in that connection to introduce records financial records of Paramount Pictures in operations in other territories, in other aspects of its business, and the court rejected any such basis of damages. Likewise, in the case of *Bigelow v. R-K-O Radio Pictures*, a case decided last summer in the Seventh Circuit, and which I believe the plaintiffs have referred to in their proposed instructions to the jury. The plaintiff there sought to establish damages on the basis of theatre operations in Illinois some dozen miles from his location, I believe, in Wisconsin, and the court stated that certainly was no proper basis for fixing or determining the amount of damage which he sustained in his operations. So I submit that any evidence relating to the Pacific Square operation, the profit or the loss, or the policy, is not a proper yardstick for the measurement of damages, and that without them there is no norm in this case.

Furthermore, in this case the plaintiffs and their auditors stated on the stand that the Mission Beach operation, as undertaken by them on January 1, 1945, was a new venture. The auditor stated that he went down there and

he created an entirely new set of books because it was a new operation, it wasn't a continuance of the old one. Mr. Finley, at great length on the stand, emphasized that he entered that project [913] for the purpose of establishing and pursuing a new policy, a policy of name bands, as he termed them, against the western bands and the family policy which Mr. Dailard had pursued, and, if you please, a very high moral policy and a very intense civic policy, as distinguished from what counsel has elected to call the haphazard policy of the alleged co-conspirator, Dailard.

I think the court has in mind all the evidence which has been presented, and I will not labor the evidentiary aspects of this case, but I will content myself in conclusion by saying that there is no evidence in this case worthy to go to the jury on the point of a conspiracy or a combination, or a concerted action of the defendants who remain in this case with the alleged co-conspirator, Dailard; there is no commodity of commerce, and there has been no interstate commerce in a commodity of commerce. Thank you. [914]

The Court: I don't think I care for any argument from the other side at this time.

The rule, of course, at this stage of the case is well known and clearly established that if there be any reasonable theory deducible from the evidence, either by inference or by direct testimony or documentary proof, that would warrant a finding favorable to the plaintiff, the court should deny the motion. I am not going into the details of it because it is not proper to do so, or necessary to do so, at this time.

There are one or two legal questions that have been threshed out before, and concerning which the court has made rulings which are in the record. One of them is the nature of interstate commerce in present-day activity.

I don't know whether the doctrine of *Federal Baseball Club v. National League* in 259 U. S., at page 200, and that of *Hart v. B. F. Keith Vaudeville Exchange*, in the Second Circuit, reported at 12 Fed. (2d), at page 341, is a present-day doctrine, in view of the decisions of the Supreme Court of the United States during the last five or six years, and since the *Socony-Vacuum* case. Business has changed. It has changed in all of its aspects. Entertainment, instead of being a matter of personal performance, has merged into something else. The integrated agencies in the amusement enterprise have become so far-flung, and yet so knitted, that the [915] situation that confronted the courts in the days of those decisions is no longer applicable. It is a difficult question to draw the line of demarcation in what is purely a personal performance not merging into interstate activity, and one that closely touches the interstate commerce clause of the Constitution. That is illustrated by such laws as the Wage and Hour Law and the National Labor Relations Act, and many other like statutes which are remedial in their aspect. While they may not be definitely applicable to a situation such as the evidence here has presented, they do throw light upon the changing course of the law, not of the Constitution, because, of course, personal service is not the subject of governmental regulation and we are all hopeful that it never will be to the extent that it would be controlled. But at the same time business has so changed. The various means of communication, new and modern in current life, have so transformed the entire

picture of human activities and human relationships, that the line of demarcation cannot be drawn with precision and nicety.

I am inclined to think that the trend of the decisions is that there is sufficient evidence here to warrant the submission of the case to the jury, under proper instructions, of course, as to how their deliberations should be pursued. The question as to "name bands" brings into consideration new entities. The evidence is clear to the fact that [916] there are gigantic business entities that have grown up for the purpose of promoting these bands, which is indicative of the fact that it is a business, it is commerce. With the use of media of communication, the radio and others, for the purpose of exploiting individuals, as well as methods of expression by individuals, and the various other means of rapid communication, it is pretty hard to say just where the line should be drawn between intrastate activities or activities of purely personal concern, and where they merge into interstate commerce.

Cases such as the Associated Press case are highly illustrative of the changed conditions that have occurred. If there is anything that should be preserved, it is the security of expression through the press, and yet we find the Associated Press case maintaining doctrines which bring that activity within the purview of congressional legislation under the commerce clause of the United States. So it is something that is in a formative period, and I am not prepared to say at this stage of the case that this does not present a matter of interstate activity.

The issue of "name bands" is a factual question. Apparently, even these gentlemen who deal in that entity or commodity or relationship are not in agreement as to what a "name band" is. It may be that it is of such a nebulous character that there can be no legal certainty to it. That is a factual [917] matter to be determined by the jury. The other questions that have been argued are factual questions. It is neither proper nor appropriate that the court should at this time express itself on this question of conspiracy. There is evidence here that may leave the predicate for a finding on that score, not on the mere fact of a conspiracy, because that has no federal aspect in and of itself, but on an alleged conspiracy and undertaking, an agreement to unreasonably affect or interfere with interstate activities. This word "conspiracy" sometimes has connotations which are not proper in the law. It is simply an understanding or agreement to do something which either as an end or a means violates some law, so that it becomes a factual question in cases, especially at this stage of the action. The court is not indicating any view upon it at this time, as to how it should be determined, and what rulings the court makes now are made without prejudice to review them later on, if they are deemed to be erroneous.

For those reasons the motions will be denied in toto.

We will meet tomorrow morning at 10:00 o'clock, gentlemen.

(Whereupon, at 4:45 o'clock p. m., Wednesday, February 6, 1946, an adjournment was taken until 10:00 o'clock a. m., Thursday, February 7, 1946.) [918]

Los Angeles, California, Thursday, February 7, 1946.
10:00 a. m.

The Court: All present. Proceed, gentlemen.

I would suggest, if it is agreeable to all of you, that when the defendants proceed you gentlemen exchange places, unless you desire to remain where you are, gentlemen. It is pretty hard to see witnesses from that desk and it is more readily available to examine witnesses where you can see them. Yet, if you desire to remain there it is immaterial to me.

Mr. Warne: There is no objection to using the podium?

The Court: Oh, no, not at all; it is perfectly all right. Ordinarily it is not, but in this case it is all right.

Mr. Doherty: I am going to make Mr. Warne do some of the work now, your Honor, and will let him make the choice.

Mr. Warne: I suggest we not disturb our relative relationship.

The Court: Very well. Have those financial statements been submitted?

Mr. Christensen: They are being typed and will be right up in five minutes, I think.

The Court: Very well.

Mr. Warne: Very well, Mr. Harold Howard. [920]

HAROLD HOWARD,

a defendant herein, having been previously duly sworn, was called as a witness on behalf of the defendants, and was examined and testified as follows:

Direct Examination

By Mr. Warne:

Q. I believe you have been sworn. Just take the stand, please.

You have already related that you are employed by the Music-Corporation of America? A. That is correct.

Q. And we will use the term, if we may, "M. C. A.", in referring to that company? A. Yes.

Q. Are you employed by any other company such as M. C. A. Artists, Inc.? A. No, sir.

Q. How long have you been employed by M. C. A.?

A. Since September of 1944.

Q. Prior to that time in what business or occupation were you engaged?

A. I was a pilot in the Army Air Corps for the three years preceding that.

Q. And before that?

A. An orchestra leader. [921]

Q. That is, you have operated an orchestra or you ran an orchestra or had an orchestra?

A. That is right.

Q. Hired musicians?

A. Hired musicians and traveled and engaged in the orchestra business in general.

Q. And your band or orchestra was known as what?

A. Hal Howard and His Orchestra.

(Testimony of Harold Howard)

Q. Played throughout the United States, engagements?

A. I wouldn't say that. About as far East as the Mississippi River, and up and down the Pacific Coast.

Q. Were you what was called a name band?

A. I would like to have considered that.

Q. Well, were you booked under your own name?

A. That is right.

Q. In various places throughout that territory?

A. That is right.

Q. Ballrooms?

A. Ballrooms, night clubs, cafes.

Q. Did you have a booking agent? A. Yes, sir.

Q. What agent?

A. Music Corporation of America.

Q. Did you know Mr. Finley prior to the time that you became employed by M. C. A.? [922]

A. As a booker, or in what capacity?

Q. Well, in any capacity.

A. I knew Mr. Finley when I was an orchestra leader, in the year 19—I believe it was about 1937 or 1938, at the Casino Gardens.

Q. And did you play there on that occasion?

A. Yes, sir.

Q. For one of his give-away dances?

A. I was employed there on a permanent engagement, so to speak, for a period of about six or eight weeks, and during that time Mr. Finley had one of his—I guess you would call it parties, or whatever name you would use for it.

(Testimony of Harold Howard)

Q. I see. Bernie Cohen was running the Casino Gardens at that time, was he?

A. Bernie Cohen and Mr. Cramer were partners.

Q. Mr. Cramer has since died, hasn't he?

A. That is correct. [923]

Q. Now, when, after you became employed by M. C. A., did you first meet Mr. Finley?

A. In San Diego, in about—either the last week of September or it might possibly have been the first week of October, 1944.

Q. What was the occasion?

A. I was down there, and at that time I was working on the cocktail units.

Q. What is a cocktail unit?

A. Well, they are a small combination of three or four pieces and usually play in cocktail lounges or small restaurants.

Q. That is a musical aggregation that is booked by booking agencies, such as M. C. A.?

A. Yes, sir.

Q. Other agents also book them?

A. Yes, they all do.

Q. All right. You were down there?

A. I was down there booking all possible business in cocktail units in the city of San Diego, because there are a great many places that use that type of unit, and during my calls on various places I called at the Trianon Ballroom, and at that time met Mr. Finley. At that time I didn't know he was connected with it. He then had Anson Weeks' orchestra in there, and we had a conversation in his office. That was either the last week in September or the first week in October. [924]

(Testimony of Harold Howard)

Q. Will you relate the conversation that you had there at that time?

A. Well, as nearly as I can recall, we discussed possible bands for the Trianon. At that time that was a little bit out of my field because cocktail units was about the only thing I had attempted to handle. We discussed the band that was there at that time. It was a band under the direction of Anson Weeks. Actually the band was, I believe, Curt Sykes' band. I believe at that time Mr. Finley advised me he was bidding, and expected to get the Mission Beach ballroom, and asked me whether or not I would be able to get bands for him, and what was the picture on it. Inasmuch as I had been with the company only three or four weeks, I wasn't too sure on the question, and I suggested that we have a meeting with Mr. Barnet, which I later arranged.

Q. That meeting was arranged in Los Angeles?

A. That is correct.

Q. The next time you saw Mr. Finley was here in Los Angeles?

A. That's correct.

Q. Where was that meeting held?

A. It was held in our office, in Mr. Barnet's office in the building?

Q. That is which building now?

A. It is a building located at 9370 Burton Way; the [925] Music Corporation of America Building, I guess you would call it.

Q. Formerly the band department occupied space in that building?

A. That's right.

Q. At the present time they are located at another location?

A. That's right.

(Testimony of Harold Howard)

Q. What is their present location?

A. 9200 Wilshire Boulevard.

Q. Now, was any one else present at the conversation besides you, Mr. Finley and Mr. Barnet?

A. I don't believe there was. I believe the three of us were all that were present at that time.

Q. Well, can you fix the date, either as to time or with reference to any other date?

A. I couldn't be definite. It might have been about the second or third week in October.

Q. I see. Relate the conversation.

A. Mr. Finley asked Mr. Barnet about the band picture, because at that time he explained he expected to get Mission Beach Ballroom, he was bidding on it and felt his bid would be successful in the competition. And Mr. Barnet explained to him at that time that we had, I guess you would call it, a first refusal agreement with Mr. Wayne Dailard, and that if [926] there were enough bands for both places that Mr. Finley—that the bands would be available to him after Mr. Dailard had refused them or he had been submitted the bands.

At the same time Mr. Finley, I believe, spoke about the possibility of a ballroom operation in Burbank, and at that time Mr. Barnet advised him that we would be happy to cooperate with him in any way, in helping him get established in Burbank. And I believe at that same meeting Mr. Barnet suggested to Mr. Finley to check on a possibility of a ballroom in Oakland, because they had a ballroom there which was not satisfactory, and the town was dance-conscious and it should have been a good spot for a dance hall operation.

(Testimony of Harold Howard)

Q. That is what Mr. Barnet said? A. Yes.

Q. Was there anything said about the possibility of having two ballrooms in San Diego?

A. I am not positive, Mr. Warne: I know that the subject was discussed at one of our meetings with Mr. Finley, that Mr. Barnet voiced the opinion that San Diego wasn't big enough to handle two competitive ballrooms, both playing big bands at the same time. I am not sure whether it was at that meeting or the following meeting which we had.

Q. It was at some meeting when Mr. Finley was present? A. Yes.

Q. Was anything said at that first meeting about Mr. [927] Finley going to Casino Gardens or getting into Casino Gardens?

A. I don't recall. I don't believe there was.

Q. Now, when was the next time—oh, let me ask you another question there. Was anything said at that time about Pacific Square or Mr. Dailard having an exclusive booking arrangement with M. C. A.?

A. I don't believe I have ever heard the word "exclusive" used in itself. I just know the word "first refusal" was used, where the bands were first to be submitted to Mr. Dailard.

Q. Now, when did you next see Mr. Finley?

A. The next time was in San Diego, and it must have been about the first week in November. It was at the date whenever the council meeting was held there.

Q. And what was the occasion? Did you go down there?

A. Yes. I flew down with Mr. Bishop.

(Testimony of Harold Howard)

Q. When was the first time that you saw Mr. Finley on that day?

A. I didn't see him that day. The first time I saw him was that evening. It might have been around 9:00, or maybe even as late as 10:00 o'clock.

Q. You were not at the council meeting that has been told about? A. No, sir.

Q. Where did you see Mr. Finley on that occasion? [928]

A. At his ballroom, the Trianon Ballroom.

Q. Was any one with you when you went to the Trianon? A. Mr. Bishop was with me.

Q. Just relate what occurred there on that occasion.

A. We were calling on various accounts in San Diego, cocktail accounts, and things of that nature, and along with those calls we stopped at the Trianon Ballroom.

Q. By "we" you mean? A. Mr. Bishop and I.

Q. Yes.

A. And when we arrived upstairs, I introduced Mr. Bishop to one of the men, who was manager of the ballroom, whom I had previously met, and Mr. Bishop saw the band leader, who was Ken Baker, and started conversing with him. At that time I went in and started talking to Mr. Finley in the office. And there was another gentleman present in there whose name I don't recall. I believe he was an associate or maybe a friend of Mr. Finley's.

Q. Now, Ken Baker, or, rather, Mr. Bishop stayed outside and talked to—

A. That is correct, to Ken Baker, and Mr. Finley and I talked a little while. He told me he felt very bitterly toward Mr. Bishop for having come down, and

(Testimony of Harold Howard)

he felt he was—that Mr. Bishop wasn't looking out for his interests, he was looking out for Mr. Dailard's. And I told him Mr. Bishop [929] was outside. He said he wasn't interested in meeting him, but I suggested the two of them talk, because I felt if they would get together they could become friends and straighten out whatever differences they had. I believe about that time Mr. Bishop came in the office.

Q. Had there been anything suggesting that they had any personal differences? A. No.

Q. Not by any one?

A. Not that I know of, no.

Q. Then Mr. Bishop walked into the room; is that correct?

A. Yes, Mr. Bishop walked into the room, and we talked, it must have been about a half an hour about the booking picture in general as regards Mission Beach and the problems which Mr. Finley expected to encounter there. And Mr. Bishop again informed him of our arrangement with Wayne Dailard, and also at that meeting Mr. Bishop discussed with Mr. Finley the possibility of his going into a ballroom operation in Burbank or in Oakland.

Q. Was that the substance of the conversation?

A. That basically was the substance of the entire conversation.

Q. Was anything said on that occasion about Mr. Bishop's connection or Mr. Bishop's favoritism to

(Testimony of Harold Howard)

Mr. Dailard and Pacific [930] Square, by either of the parties?

A. That is a hard question to answer, Mr. Warne. Mr. Finley, I believe, expressed the opinion that Mr. Bishop was showing favoritism to Pacific Square.

Q. And what was Bishop's reply to that?

A. Bishop's reply to that was that was a first refusal agreement whereby bands were first to be submitted to Pacific Square before being submitted to any one else, and at that time told Mr. Finley, I am sure, that he was even having difficulty supplying Pacific Square with bands, and it would be extremely difficult to supply both places with good calibre bands.

Q. Was anything said about the prices of bands?

A. Mr. Finley expressed the opinion that he thought that Wayne Dailard was paying excessive prices for bands, and, in his opinion, he did not feel it was good business, and said he did not feel he would like to pay those prices.

Q. Any specific names of bands that were discussed? Do you remember or not?

A. I am not certain.

Q. Did Mr. Finley say anything about when he was going to open the ballroom? [931]

A. I am not certain of that.

Q. You have no further recollection of any matters that were discussed there?

A. No. The conversation was quite general.

Q. Was anything said about Ken Baker and the unit that was playing there at the time, at the Trianon?

A. Well, I am not certain of that. It must have been discussed, but I am not sure of any specific conversation.

(Testimony of Harold Howard)

Q. When next did you see Mr. Finley?

A. The next occasion was when Mr. Finley came to Los Angeles and also had another meeting with Mr. Barnet.

Q. Was that the Copper Kettle luncheon episode?

A. After they had met in Mr. Barnet's office they went over to the Copper Room, it is, on Beverly Drive.

Q. Copper Room?

A. Copper Room; and I was in and out during that first meeting so much that I was not even in on the conversations. And later—

Q. Were you in and out at luncheon?

A. No; in and out at their meeting before they went to lunch. I joined them at the Copper Room.

Q. Do you remember the conversation at the Copper Room?

A. I don't remember exact conversations. Bands undoubtedly were discussed, because I know that is why Mr. Finley was here. [932]

Q. Was anything said at that time about booking bands direct?

Mr. Christensen: To which we object as leading and suggestive.

Mr. Warne: I am talking about the subject matter. I am not asking him about what was said or what was said.

The Court: Overruled.

A. At the meeting, I am not certain, Mr. Warne, whether this was in the Copper Room or before we went over, Mr. Finley did ask Mr. Barnet if he had any objections or if there was anything to prevent him from going to the bands direct and arranging his own bookings.

(Testimony of Harold Howard)

Mr. Barnet informed him that he had no objections and there was no reason why he couldn't do that.

Q. By Mr. Warne: Was there anything said in the conversation with reference to acts or attractions, as they are sometimes called, as opposed to bands?

May I ask that you keep your hand down from your mouth?

The Witness: Yes, sir.

Mr. Warne: Because the jury has to hear, and sometimes it is difficult to speak effectively.

A. I don't recall any conversations regarding acts or attractions at that meeting.

Q. Anyone else sit in on the luncheon except you and Mr. Finley and Mr. Barnet? [933]

A. Mr. Later, I believe, was at the lunch, and I believe Billy McDonald was there.

Q. Do you remember the names of any bands or band leaders being discussed in that conversation?

A. I am not certain of that; no, sir.

Q. Was there any discussion of the Trianon or Trianon bookings for the Trianon ballroom on that occasion?

A. I am not certain of any exact conversations. At some time during this period I talked with Mr. Finley about the possibility of bringing back Kurt Sykes' orchestra. I am not certain about the date of that.

Q. I see. There has been some mention here with reference to a Paul Martin booking. Was that made through you or with you? A. Yes, sir.

Q. When was that made, approximately?

A. This is approximate. It must have been about the last week in December.

(Testimony of Harold Howard)

Q. Will you just relate what occurred on that occasion?

A. Well, Mr. Finley was up here at the time and was down in the office which we had. We had a theatre fixed up as a temporary office in our building. There were about four desks, as I recall, in that one building. And Mr. Finley and I discussed the possibility of bringing Paul Martin down to the Trianon; and Paul Martin was available at that [934] time so I called Paul Martin and got his authorization for the booking. He agreed to accept it and we practically terminated our booking right there, because we had Mr. Martin's confirmation and Mr. Finley's, and it seemed agreeable all the way around. And following that, I believe I went up immediately to Mr. Barnet.

Q. Was Mr. Finley with you?

A. Mr. Finley was with me; yes, sir. And I went up to Mr. Barnet's office to inform him of the booking; and he asked me if I had definitely committed the booking, definitely had arranged it. So I had at that time, because I had already called all the parties involved. So he said we would go ahead with it, and about that time instructed me to have the publicity department take our name off of the publicity on the Paul Martin engagement of the publicity used.

Q. Anything said about the contracts that should be used?

A. Yes. He said that the contracts, instead of being made on our usual form, which is American Federation of Musicians and with our name printed on the top, should be prepared on a regular American Federation of Musicians form without our name.

(Testimony of Harold Howard)

Q. At that time or at any other time did Mr. Barnet ever tell you that you should not book any bands for Larry Finley? [935] A. No, sir.

Q. Did Mr. Barnet at that time or at any other time ever tell you that you should not book any bands for Mission Beach? A. No, sir.

Q. Now, I want to get the picture of this building there. You spoke about a theatre. Was that an old audition room being occupied?

A. It was used as an audition room, and some bands even used the room to rehearse at various times. More than anything else, it was used as an audition room for small cocktail audiences.

Q. Mr. Barnet's office was in another part of the building?

A. Yes, sir; it was upstairs in one of the wings of the building.

Q. And Mr. Bishop's office was where?

A. Directly across the hall from Mr. Barnet's office.

Q. Subsequently did you see or talk to Mr. Finley on any other occasions?

A. I believe I had a telephone conversation with Mr. Finley after the Paul Martin booking was completely signed. I am not certain of the subject of the conversation. It was in regard to the Paul Martin booking. Following that, the next time I personally— [936]

Q. By the way, Paul Martin played the Trianon?

A. Yes, sir.

Q. On the dates that you had arranged on the occasion of that booking? A. Yes, sir.

(Testimony of Harold Howard)

Q. Now, the next time you—

A. The next time I personally saw Mr. Finley was when he came up to see Mr. Later whose desk was about 10 or 12 feet from mine in this auditorium or in this theatre.

Q. And was there any discussion of any band bookings with you on that occasion?

A. I am not certain.

Q. Do you recall Mr. Finley asked you on that occasion about the bookings of any one band or any bands you might have had open?

A. It is very possible, Mr. Warne, that he did. I am not sure of the conversations.

Q. All right. Now, then, this conversation when he was discussing matters with Mr. Later, did you sit in on that conversation or just see him there with him?

A. I wouldn't say that I sat in on it. Almost everything that happened downstairs everybody was in on that was down there.

Q. Did you overhear what subject matter was being discussed? [937]

A. Yes, sir. Mr. Finley was discussing available attractions for presentation at Mission Beach.

Q. By attractions you mean acts other than bands?

A. Acts and picture personalities.

Q. I see. That is other than bands?

A. Yes, sir.

Q. Do you recall any other conversation or anything specific about the conversation, any part that you took in it?

(Testimony of Harold Howard)

A. No specific part that I took in that conversation, because it was held with Mr. Later. I know that they were discussing attractions.

Q. When next did you have any conversation with Mr. Finley?

A. I believe the next time that I was in touch with Mr. Finley was by telephone.

Q. And what was the occasion?

A. During the month of—sometime during the month of February—I am not certain just when it was, and we had been advised that Mr. Finley had two or three weekends at Mission Beach on which he was open for bookings on bands. At that time I wanted to submit him Ted Fio Rito and Jack Teagarden.

Q. Well, relate the conversation, rather than just saying you submitted him. [938]

A. Well, I called Mr. Finley and advised him that we had Jack Teagarden and Ted Fio Rito, both open and available on the dates that he had requested—that I had been advised that he was requesting. Mr. Finley at that time, when I quoted the price, said he felt the price was excessive for the bands. He said that he didn't feel that he wanted to engage them for that time, mainly for that reason—and I believe in that same conversation I again asked him about Kurt Sykes for the Trianon ballroom.

Q. Was there anything said about Bob Chester? Do you remember that?

A. Bob Chester we also submitted at the same time, as I recall.

(Testimony of Harold Howard)

Q. Do you know—or, by the way, on that occasion you wrote this letter to Mr. Finley of February 27th, Defendants' Exhibit K?

A. Yes, sir. This letter was written after my telephone conversation with Mr. Finley.

Q. Does the looking at the letter refresh your recollection as to any other matter that may have been discussed?

A. Well, yes. I didn't recall this, but in the letter, when Mr. Finley expressed the opinion that the price was too high on the bands, he was operating at that time two days a week. Sometimes before that, in one of our conversations, he had expressed the thought that he might possibly, at some [939] time or other, operate three days a week. The prices on the bands which I submitted him were for a three-day period. Inasmuch as he was operating on a two-day basis, he felt the price was high on the bands. I explained to him at that time in some detail that bands of this caliber that were available for weekends would require a three-day booking in order to make it successful or profitable for them, otherwise, they would hold out and play one-nighters on separate engagements. That was the reason for the price being what it was. In other words, the price was the same I submitted to Mr. Finley for a two-day engagement as it would have been for a three-day engagement. And I thought possibly that he might, in view of that, elect to operate three days instead of two. And in the letter I call his attention to that as a reason why the prices on the bands were at that figure.

Q. I note in this letter you say in the last paragraph: "We are now making plans for the itineraries on these

(Testimony of Harold Howard)

bands. In case you desire to reconsider your refusal, it is important that you communicate with us at once." Did you ever hear from Mr. Finley again with reference to these bands? A. No, sir.

Q. Since that time have you ever heard from him? Since that time have you ever heard from Mr. Finley, by telephone or otherwise, with any request that you provide bands for [940] Mission Beach or give him names of bands that might be available?

A. No, sir; I haven't.

Q. In other words, he has made no request whatever of you? A. Not to me, sir.

Q. Did you handle the booking of any bands for Mr. Finley at Casino Gardens? A. Yes, sir.

Q. What bands did you book in there, do you remember?

A. I did not handle the actual bookings—booking, in this case, because I believe Mr. Finley had gone direct to Harry James. However, I did put through the contracts and handle the paper work on that, and—

Q. Did you ever—pardon me.

A. And along with that thought, I also handled the booking and the paper work on—let's see; Jan Savitt's orchestra, which currently is today in there, but I do not believe Mr. Finley is connected with that. I handled the paper work and the booking on Charlie Barnet for Mr. Finley.

Q. Did you see and talk to Mr. Finley on occasion while this was being done? A. Yes, sir.

(Testimony of Harold Howard)

Q. On any of those occasions did Mr. Finley ever request that you submit to him the names of any bands? [941]

A. For Mission Beach?

Q. For playing at Mission Beach- A. No, sir.

Q. Did he ever suggest to you the names of any bands that he would like to have you hire for Mission Beach?

A. No, sir.

Q. Was there any discussion about Mission Beach in those conversations?

A. Not about Mission Beach; no, sir.

Mr. Warne: You may cross-examine.

Cross Examination

By Mr. Christensen:

Q. With reference to this Charlie Barnet booking, when was that, sir?

A. The Charlie Barnet booking started, I believe, Mr. Christensen, on October 31st. I am not positive of that. I believe Mr. Finley had talked with Barnet about it previously.

Q. That was in New York, according to your information?

A. Yes, sir.

Q. And Charlie Barnet played for Mr. Finley at Mission Beach when?

A. He played for Mr. Finley at Mission Beach on the weekend. I believe it was the last weekend in December and—

Q. And also— [942]

A. And New Year's Eve and New Year's Day and the following weekend.

(Testimony of Harold Howard)

Q. Now, then, the first Friday—

The Court: Just a moment. I would like the year there, Mr. Howard.

The Witness: That year was this current year.

The Court: 1945?

The Witness: 1945 and the New Year's Day of 1946, sir.

The Court: Was the conversation in New York in October of 1945?

The Witness: Mr. Finley's conversations with Mr. Barnet were undoubtedly preceding October, probably in September, or even August, in New York.

Q. By Mr. Christensen: Now, you recall that Mr. Barnet, Charlie Barnet, played for Mr. Finley at the Mission Beach ballroom on the first Friday in January, don't you? A. Yes, sir.

Q. Well, that is to say, he was supposed to play there under the contract? A. That is correct.

Q. But he did not show up? A. That is correct.

Q. Charlie Barnet called you and advised you that he was ill or indisposed, didn't he?

A. A young lady friend of his called me and advised me [943] of that.

Q. Did you communicate that information to Mr. Finley? A. No, sir.

Q. Did someone tell you not to? A. No, sir.

Q. And you know that because of that information not coming to Mr. Finley they were required to make refunds there on account of it? A. That is correct.

Q. Were you ever instructed by any of your superiors not to discuss bands with Larry Finley?

A. No, sir.

(Testimony of Harold Howard)

Q. Were you instructed by them to not discuss bands with Mr. Finley concerning bookings at Mission Beach?

A. No, sir.

Q. At no time? A. At no time.

Q. Mr. Paul Martin was under contract to M. C. A. at the time he was booked to play at the Trianon ball-room? A. That is correct.

Q. Was he offered to Wayne Dailard before being submitted to Mr. Finley? A. I don't believe so, sir.

Q. Who told you to prepare the contract on the American Federation of Musicians' form? [944]

A. Mr. Barnet.

Q. And did he tell you why?

A. No, sir; he didn't.

Q. You received—that is to say, M. C. A. received 10 per cent commission on that booking, did it not?

A. That is correct.

Q. And did Mr. Barnet or anyone else at M. C. A. tell you to not put the matter of the commission on the original of that contract?

A. May I answer that this way, Mr. Christensen? The amount of commission is not written on the contracts?

Q. Well, the percentage of the commission, I should have said?

A. Percentage is not written on contracts. It is only placed on one copy which goes to the Musicians' Union for their records.

Q. It was on the one you gave Mr. Finley, wasn't it?

A. If it was, it might have been in error, because ordinarily the contract price is the only thing which appears on those.

(Testimony of Harold Howard)

Q. Can you remember whether it was on it or not?

A. No; I am not certain.

Q. Mr. Howard, who dictated this letter to Mr. Finley bearing date of February 27, 1945, and being Defendants' Exhibit K? [945]

A. Is that the letter I just saw here, Mr. Christensen?

Q. Yes.

A. I dictated the letter with the assistance of Mr. Ames Bishop.

Q. I see. He told you what to put in this letter?

A. No, sir. I wrote the letter, and at that time his office was there, his desk was about three feet from mine.

Q. Mr. Joe Ross, one of the attorneys for M. C. A., had previously discussed this matter with you, had he not?

A. No, sir. He had discussed it, I believe, with Mr. Barnet.

Q. Oh, I see. And after that, this letter was written?

A. I assume that it was.

Q. You recall that Mr. Barnet did tell Mr. Finley that he, Mr. Finley, should go into business up in Oakland? A. Yes, sir.

Q. Told him that if he opened a ballroom in Oakland, the M. C. A. would furnish him name bands?

A. Yes, sir.

Q. If he would open a ballroom in Burbank, M. C. A. would furnish him name bands?

A. That is correct, sir.

Q. Or, if he went into the Casino Gardens in Ocean Park, M. C. A. would furnish him with name bands?

A. Yes, sir. That was the policy there. [946]

(Testimony of Harold Howard)

Q. And you know that M. C. A. has been furnishing name bands to the Aragon ballroom there in Ocean Park, don't you? A. Yes, that is correct.

Q. But Mr. Barnet said that he could not or would not furnish bands to Larry Finley to be played at Mission Beach?

Mr. Warne: Just a moment. Are you attempting to fix this at any specific time? This is an impeaching question, sir. If I may offer an objection unless—

Mr. Christensen: It is cross examination.

The Court: Yes, I think it is cross examination.

Mr. Warne: Very well.

The Witness: Will you repeat the question, please?

(Question read by the reporter.)

A. No, sir; he didn't say that. He said that the bands first had to be submitted to Mr. Dailard, and that if there were enough bands to provide Mr. Finley with bands after that, they would be available to him.

Q. By Mr. Christensen: To your knowledge, did Mr. Barnet or Mr. Bishop ever offer any bands to Larry Finley to play at Mission Beach ballroom?

A. I am not certain of that, sir.

Q. You never heard of any being offered, did you?

A. I personally submitted Ted Fio Rito and Jack Teagarden and the Bob Chester bands.

Q. But, with that single exception, you never heard of [947] one?

A. I don't believe there were any bands available at that time.

Q. This offer of Bob Chester and Jack Teagarden and Ted Fio Rito was after this letter had been written

(Testimony of Harold Howard)

by you to Mr. Finley? I am referring, of course, to Defendants' Exhibit K. A. No, sir.

Q. When did—

A. I talked to Mr. Finley on the telephone prior to the writing of that letter.

Q. How much prior, sir?

A. The letter was probably written within a couple of hours after our conversation.

Q. But, in any event, it was after the conversation with Joe Ross?

A. I have never conversed with Joe Ross on this.

Q. You knew about that, though, didn't you?

A. Yes, sir.

Q. And it was after that, wasn't it?

A. That is right.

Q. You knew, of course, that Bob Chester and Jack Teagarden had played together at Pacific Square ballroom just prior to the time you offered them to Mr. Finley?

A. I believe they had. I wasn't exactly aware of it, [948]but it is very likely that they had, because we play bands back down there sometimes two and three weeks consecutively.

Q. I mean that the two bands played in a single engagement? A. That is very possible.

Q. You never heard of that happening at Pacific Square before, had you?

A. I had never been in on the picture at Pacific Square, Mr. Christensen.

(Testimony of Harold Howard)

Q. And you know, of course, that at least from the box-office standpoint Jack Teagarden and Bob Chester had not been profitable?

A. I am not certain of that. I am not well enough acquainted with the figures at Pacific Square.

Q. Mr. Finley, of course, told you that they had proven to be a failure when playing together at Pacific Square?

A. It is possible he might have told me that. I am not certain.

Q. And he told you, also, that under those circumstances he certainly could not take just one of those bands and play it shortly after they had had that engagement at Pacific Square; that is right, isn't it, sir?

A. I am not certain, Mr. Christensen. I don't recall any specific conversation.

Q. And he told you, also, that so far as Ted Fio Rito [949] was concerned he felt that his price was high?

A. I believe he did. At some time during our conversation he expressed that opinion.

Q. He said, now, for three days at Pacific Square you had charged the same sum of money "that you are now asking me to pay for two days"?

A. That is correct. And I assumed that he might possibly want to operate for three days.

Q. Now, you recall, do you not, that at the time of the luncheon at the Copper Kettle Mr. Jan Garber was present?

A. I have been told that, Mr. Christensen. I didn't recall meeting Jan Garber there.

(Testimony of Harold Howard)

Q. As a matter of fact, you have a very hazy memory, do you not, of the conversation that occurred at the Copper Kettle? A. Yes, I do.

Q. And likewise, relative to the conversation that occurred at the office of the Music Corporation of America immediately before leaving for the Copper Kettle, do you not?

A. Yes, sir. I was in and out a good deal and did not spend the entire time in the office.

Q. As a matter of fact, you do not recall the conversation, is that right?

A. I wouldn't say that I don't recall it. I definitely do not recall any specific conversation that I know occurred [950] exactly at that time.

Q. At the time that you were present down there at the Trianon ballroom on the evening of the day that the contract was let to Mr. Finley—you recall that occasion?

A. Yes, sir.

Q. On that occasion you recall that Mr. Finley said to Mr. Bishop at that time that he thought it was a very low thing for him, Mr. Bishop to have done there at the Council meeting?

A. I am not certain of the exact words used. I would say that would sum it up in a general way. [951]

Q. And that he said that he thought it was a very low thing for him to have called Jack Flynn and asked Jack Flynn to withdraw the letter which he, Flynn, had theretofore given to Mr. Finley?

A. I don't recall anything of that nature, Mr. Christensen.

Q. Do you recall mentioning that he thought it was also a very bad thing for him, Ames Bishop, to have told

(Testimony of Harold Howard)

the other agencies that the contract had been let to Wayne Dailard?

A. No, sir, I don't recall hearing anything of that nature.

Q. Now, you say that the band appearing at that time at the Trianon was really Curt Sykes band, but it had for its leader Anson Weeks?

A. That is correct.

Q. That is a common practice, isn't it?

A. Quite often.

Q. So that really it is the aggregation that is important, isn't it, the musicians themselves that are an important feature?

A. Well, that is hard to say. Generally, if the band was bad, it wouldn't be acceptable to anybody.

Q. That is right. Now, is it not also true that it is the practice today to advertise specifically various members of the orchestra? [952]

A. I would say that is only true when a member is a star or well-known personality.

Q. Well, for illustration, the Harry James band, you are familiar with that, aren't you? A. Yes, sir.

Q. You know that in the advertising of Harry James they advertise not only Harry James, but "His Musicmakers"?

A. Well, you mean just the word "Musicmakers"?

Q. They say that, too?

A. "Harry James and His Musicmakers."

Q. Then they also follow it by featuring certain persons?

A. A band of that calibre usually has some star personalities or top performers in it.

(Testimony of Harold Howard)

Q. Now, you know, for example, in the Harry James band advertising, it generally says, "Featuring Ginnie Powell, Buddy DiVito, Corky Corcoran, Willie Smith, Juan Tizol, Jimmy Campbell, Arnold Ross, Lew Fromm"?

A. I am not certain of all of that, but I assume it to be true if you are reading from something.

Q. And you know that other bands do likewise?

A. Yes, sir, they name their feature artists.

Q. Now, you and Mr. Finley had various conversations concerning bands for the Mission Beach Ballroom, didn't you?

A. During the various times we met we usually discussed that in one form or another. [953]

Q. And you, Mr. Howard, tried to be as helpful to Mr. Finley as you could?

A. In any way I could, yes, sir.

Q. It was you who had submitted the Paul Martin band to Mr. Finley?

A. That is correct.

Q. It was only after Mr. Barnet learned about the fact that you had submitted it that it was put on an American Federation of Musicians contract?

A. That is correct.

Q. You never did that before, did you?

A. No, my experience in the booking of bands of that size at that time was rather limited.

Q. As a matter of fact, you had to do considerable searching to find one of those forms, didn't you?

A. I am not so sure of that, sir, because I am sure we had plenty of them around.

Q. That has been your first and only experience in doing it that way, hasn't it?

A. That is correct.

(Testimony of Harold Howard)

Mr. Christensen: All right. Think you very much, Mr. Howard.

Mr. Warne: Just a moment. I have another question or two, Mr. Howard? [954]

Redirect Examination

By Mr. Warne:

Q. Just so that we get it straight, in so far as you know Charlie Barnet is no relation to Larry Barnet?

A. I am certain there is no relation.

Mr. Christensen: I would even stipulate if you want that.

Q. By Mr. Warne: All right. Then let's get this straight: secondly, on this matter of Charlie Barnet some confusion had arisen with reference to the price at which he was booked?

Mr. Christensen: To which we object as leading and suggestive.

The Court: Overruled.

Q. By Mr. Warne: Is that correct?

A. You will have to explain what booking you are referring to.

Q. The Charlie Barnet booking with reference to which you had some conversation.

A. Are you talking about Casino Gardens?

Q. Correct, Casino Gardens. A. Yes, sir.

Q. Will you relate the contacts that you had with Mr. Finley in that regard?

A. Yes, sir. Mr. Finley had previously contacted Charlie [955] Barnet in New York and had made—first, let me go back to this. First, Mr. Barnet had talked to Mr. Finley regarding the booking, or to Birnie Cohen,

(Testimony of Harold Howard)

who was the manager of the ballroom, and Mr. Cohen had given him a definite commitment at a certain price and a certain percentage, and Mr. Barnet got Charlie Barnet's O.K. for that booking on those figures. Then Mr. Cohen called, or at the next meeting Mr. Barnet had with him, and said he had changed his mind, he couldn't operate the deal that way, after Mr. Barnet had gotten the confirmation from all of the parties involved. The disagreement, as I recall, was respecting the amount of percentage Charlie Barnet was going to get.

Q. Mr. Finley was objecting regarding the percentage Mr. Barnet was to get?

Mr. Christensen: That is objected to.

The Court: Overruled.

The Witness (Continuing): Mr. Finley then made a trip to New York and I believe he said he was going back there for some other reason, and while there would contact Mr. Barnet, this is Charlie Barnet, and talk to him regarding the disagreement on the percentage. I remember Mr. Finley did contact him back in New York, and arranged for the percentage agreement on the figures which he wanted to pay.

Q. By Mr. Warne: May I ask you this: with reference to the Teagarden band and the Ted FioRito band, they played [956] Pacific Square some time, or shortly after your February 27th conversation which you had with Mr. Finley?

A. Yes, sir, they did, both of them.

(Testimony of Harold Howard)

Q. Do you remember whether they played more than once, whether either of them played the Square more than once later in 1945?

A. Yes, sir, Ted FioRito was back there. I will take that back. He was back again in the first part of '46.

Q. I see. Now, relative to the names of feature artists being advertised along with the band, or along with the leader of the band, the advertisement there referred to the particular artist who performed as a part of the band; am I correct? A. Yes, sir.

Mr. Warne: In other words, you have an advertisement there. May I see it, please?

Mr. Christensen: Sure.

(The document referred to was handed to counsel.)

Q. By Mr. Warne: This one, Juan Tizol, is that how you say it?

A. I am not sure how it is pronounced.

Q. Do you know him?

A. I have heard of him. I don't know who he is or what he has done.

Q. Do you know what instrument he plays? [957]

A. No.

Q. Do you know any of the particular artists, that is, you yourself, do you know any of the names of the particular artists, any of those that were read off to you?

A. Yes, I know Buddy DiVito is a singer, and the girl, the first name, is a singer.

Q. Ginnie Powell?

A. Ginnie Powell. Smith is a saxaphonist and Corky Corcoran is a saxaphone player .

(Testimony of Harold Howard)

Q. In so far as you know, these individuals only render their personal services for the band or in conjunction with the band or orchestra?

A. That is correct.

Mr. Warne: By the way, I believe you had that original contract for Mr. Paul Martin, Mr. Christensen, when you were examining the witness?

Mr. Christensen: I had Mr. Finley's copy, which is not the original.

Mr. Warne: Isn't it a duplicate-original?

Mr. Christensen: I think so.

Mr. Warne: May I see it?

Mr. Christensen: Yes. (Handing document to counsel.)

The Court: While you are looking at that, I think we will take our recess. There will probably be some re-cross. We will take a recess for a few minutes, ladies and gentlemen, [958] and remember the admonition and keep its terms inviolate.

(A short recess was taken.)

The Court: All present. Proceed.

Q. By Mr. Warne: Mr. Howard, with reference to the musicians, or, rather, the feature artists who play with bands and who are sometimes advertised as playing with them, what is your knowledge or experience with reference to any changes that are made in those artists from time to time?

A. Changes occur quite frequently in all bands, and for that reason I think that is probably the primary reason when we send out publicity we send out only pictures of the leader or maybe the boy and girl singer with the band, and we send no group pictures at all, be-

(Testimony of Harold Howard)

cause the personnel does change, and perhaps some people would wonder why the same people weren't there if we did send the group pictures.

Q. That is, these artists or musicians change from one leader to another?

A. From one leader to another.

Q. Occasionally they start out with a band of their own?

A. That has been quite often.

Q. Something has been said about some conversation you had with Mr. Barnet about Joe Ross, or a call from Joe Ross. Just what was said about that?

A. Well, Mr. Barnet, I understood, had had a telephone [959] call, I believe it was from Joe Ross, in which Mr. Ross informed him that Mr. Finley had advised him he had certain dates open at Mission Beach. I have forgotten just exactly what those dates were. Anyway, certain dates were open, and Mr. Barnet then informed me or asked me who we had available for submission to Mr. Finley, and at that time I called him and submitted the Ted FioRito band, and the Jack Teagarden and Bob Chester bands.

Mr. Warne: No further questions.

Recross Examination

By Mr. Christensen:

Q. You didn't call Dailard and submit either the Teagarden, Chester or FioRito bands to him first?

A. No, sir.

Q. Always theretofore you had submitted all bands to Dailard first?

A. Not in the case of Paul Martin.

(Testimony of Harold Howard)

Q. With that exception?

A. I had never submitted any bands to Mr. Dailard.

Q. You said there was a change in personnel. Isn't it true that band leaders are always trying to improve their bands?

A. That is correct.

Q. And it is their objective to have as fine a group of musicians and attractions as possible? [960]

A. That is correct.

Q. That is the thing that makes the band, isn't it?

A. That is undoubtedly a contributing thing, very definitely.

Q. Music Corporation of America prepares advertising matter which it distributes in connection with these bands?

A. The leader, in conjunction with the advertising department.

Q. The advertising matter is sent to the ballroom operator promptly upon making of the engagement?

A. That is correct.

Q. That is for publication in newspapers?

A. That's right, part of it.

Q. And the advertising bears the words, "M. C. A. presents"?

A. I believe it does.

Q. You arrange, as often as possible, to have the bands play over the radio?

A. Well, actually that usually is the result of the booking of the engagement, if the particular ballroom or hotel happens to have a radio wire in it, then the band naturally will appear on the air.

Q. For broadcasting purposes?

A. That is correct.

(Testimony of Harold Howard)

Q. Yes.

A. At that time we discussed the percentage arrangement, and I have forgotten the exact percentage which Charlie Barnet was asking, but he felt at that time—Mr. Finley felt that was not a good arrangement for him and he wanted a better price, and pointed out the fact that they would have air time in there, which should be an additional inducement for the band to come in at his figures.

Q. That is more or less an inducement for a band to come into a ballroom, isn't it?

A. I would say it is, yes, sir.

Q. Now, that conversation concerned itself with playing at Casino Gardens only, did it not?

A. That's right. [964]

Q. You, however, did not submit Charlie Barnet to Mr. Finley for an engagement at Mission Beach, did you?

A. No, I didn't submit Charlie Barnet for an engagement. I believe Mr. Finley made his own negotiations on that.

Mr. Christensen: That is right. That is all. Thank you again.

Redirect Examination

By Mr. Warne:

Q. Just a minute. Mr. Finley didn't ask you to book Charlie Barnet into Mission Beach? A. No, sir.

(Testimony of Harold Howard)

Q. He didn't tell you, or, did he say anything about going back to New York to personally negotiate for him to play at Misison Beach?

A. As near as I call recall, Mr. Warne, Mr. Finley said he was going back to New York anyway, and for me to advise Charlie Barnet in a telephone conversation which I was going to have with him that day not to do anything regarding anything until he got back there, and he would call upon him when he was in New York.

Q. But he didn't mention that he was going to try to get him for Mission Beach?

A. I don't believe he did.

Q. You didn't tell Mr. Barnet on the telephone, "Now, don't play at Mission Beach for Larry Finley"? [965]

A. No, sir.

Q. You didn't discuss Mission Beach; is that right?

A. Not that I recall.

Mr. Juan: That is all.

Recross Examination

By Mr. Christensen:

Q. To refresh your recollection, did Mr. Finley say, "Don't tell anybody about my trip to New York because Music Corporation of America would kill the deal if they learned about it"?

A. I don't recall anything of that nature, Mr. Christensen.

Mr. Christensen: That is all.

Mr. Warne: That is all. Mr. Bishop.

HAROLD EAMES BISHOP,

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your full name, please?

The Witness: Harold Eames Bishop.

By Mr. Warne:

Q. They call you Ames?

A. They call me Ames.

Q. But it is Eames?

A. It is spelled Eames.

Q. Mr. Bishop, by whom are you employed? [966]

A. Music Corporation of America.

Q. You have been employed by them for approximately how long? A. Approximately eight years.

Q. In what capacity are you employed?

A. Salesman.

Q. Are you an officer of the corporation?

A. No .

Q. You have been employed as a salesman during all of that period?

A. No, for the last seven years my responsibilities have been in the field of sales.

Q. And prior to that?

A. I was—when I first became employed by Music Corporation of America, I was more of an office boy in learning the business.

Q. As a salesman, what are your general duties?

A. My general duties are to contact prospective purchasers of music, to discuss with them available orches-

(Testimony of Harold Eames Bishop)

tras, and to try to arrange a booking that is satisfactory to the orchestra leader and to the purchaser.

Q. Now, when you say "try to find a purchaser" or "try to sell music," what do you mean by that?

A. Well, we have orchestras under management by our organization, and it is our responsibility to offer to those [967] orchestras employment opportunities for their acceptance or refusal. We try to present the offers from purchasers to the band leaders, and then they accept or reject the offers which we have secured for them.

Q. Do you have any particular territory that you work?

A. The territory which I have generally is the entire territory of the Los Angeles office from Denver to the ocean and from Mexico to Canada.

Q. Who is your immediate superior?

A. Mr. Barnet.

Q. He manages the band department?

A. He is the manager of the band department, yes.

Q. A number of other salesmen, as you call them, are also there?

A. There are a number of other salesmen in the department, yes.

Q. Also under Mr. Barnet?

A. Also under Mr. Barnet .

Q. When did you first meet Mr. Finley?

A. I first met Mr. Finley in approximately 1943, in the middle of the year. He telephoned our office at that time, and over the phone he stated that he was interested in the possibility of erecting a ballroom in the vicinity of Burbank, and he asked that a representative of our company call on him in Burbank, which I did. I went

(Testimony of Harold Eames Bishop)

to his jewelry store and [968] discussed with him the possibilities of his ballroom. At that time I think he had a picture of the prospective plants and diagrams of ballrooms. We talked generally about the availability of orchestras, and he was then to advise us when his plans were more definite and he could talk in terms of definite booking procedures. We never heard further from him in regard to the subject of that call.

Q. When was the next time that you met Mr. Finley?

A. The next time that I met Mr. Finley was on the evening of the meeting in the City Council in San Diego, when the bids were considered for Mission Beach. At that time I met him in his ballroom, the Trianon or Radcliffe ballroom.

Q. Let's pick up some of the space in the interim. You know Mr. Wayne Dailard? A. Yes.

Q. When did you first start dealing with Mr. Wayne Dailard in connection with orchestras?

A. Some time in the—around September of 1941. That is an approximate date, that I started servicing Mr. Dailard's account.

Q. At that time he was operating what?

A. He was operating at that time the Pacific Square and also the Mission Beach Ballroom.

Q. You call that servicing an account, or you used a term such as that? [969]

A. The term "servicing an account" means—it is an office term where an individual in our organization is looking out for the bookings in representing our attractions in that particular account.

(Testimony of Harold Eames Bishop)

Q. Are there other accounts that you service, shall we say, in the same way—

A. There are other accounts.

Q. —that you did Wayne Dailard's?

A. That is correct.

Q. Both in Los Angeles and in other places?

A. Both in Los Angeles and all throughout the Pacific Coast area.

Q. Now, had Mr. Dailard been a customer of M. C. A., that is to say, had he bought or had he engaged the services of orchestras prior to that time?

A. He had engaged the services of orchestras prior to that time?

Q. Do you know generally the history of his relationship with M. C. A.?

A. Very generally, up to that time.

Q. You had not engaged for him the services of any orchestras up to about the time that you stated?

A. That is true.

Q. There was some other member of the M. C. A. organization which was handling that account? [970]

A. That is true.

Q. Who was that?

A. I believe it was Lyle Thayer.

Q. There has been introduced in evidence here Defendants' Exhibit E. I ask you if you recall seeing that document before. A. I do.

Q. At the time you started to deal with Mr. Dailard, were you advised that this contract was in existence?

A. At the time of my—the commencement of my relationship with Mr. Dailard, I was advised that there

(Testimony of Harold Eames Bishop)

was a letter of understanding relative to submitting him orchestras first in the San Diego area.

Q. Did you read the letter at or about that time?

A. I never read the letter.

Q. You did not?

A. I have never seen that original letter, no.

Q. You have never seen that original letter?

A. I have never seen that original letter.

Q. Now, do you remember Miss Katleman who testified here as a witness? A. Yes.

Q. Do you remember when she went to work for you?

A. Not exactly. I believe it was some time in June or July of 1941; approximately that time. [971]

Q. Did you ever have a conversation with Miss Katleman in the month of September, October or November, 1941, or December, or at any time, in which she said to you, in substance or effect, "I have read the regulations of the American Federation of Musicians and understand that you cannot have an exclusive booking arrangement with any operator of a ballroom or place of amusement or entertainment. How does it come that you have such arrangement with Mr. Dailard or with Pacific Square?" And did you make the answer, "Well, there are ways of getting around the regulations of the American Federation of Musicians"?

A. No such conversation was had with Miss Katleman at any time.

Q. Now, when was it that you first knew or were advised that Mr. Finley was going to submit a bid for the lease on Mission Beach?

A. I don't recall the exact time. I believe it was approximately, however, the first part of October, some

(Testimony of Harold Eames Bishop)

time right around in there, that I heard Mr. Finley was interested in securing the lease at Mission Beach.

Q. Did you have any conversation with Mr. Finley before he made an offer to the City Council?

A. No conversations were had with Mr. Finley.

Q. Did you have any conversations with Mr. Dailard about Mr. Dailard submitting a bid? [972]

A. Yes, Mr. Dailard advised me that he was anxious to continue on with the operation of Mission Beach, and that he was submitting a bid.

Q. Did Mr. Dailard ever show you the form of bid which he was going to submit? A. No, he did not.

Q. I call your attention to Plaintiff's Exhibit 6, which is addressed to the City Council, and has been read in evidence here, and I ask you to take a look at that. You have examined this document before?

A. At the time my deposition was taken by Mr. Finley's attorneys.

Q. And this is the Dailard bid?

A. That is the Dailard bid.

Mr. Doherty: Refer to the exhibit number.

Mr. Warne: Yes, this is Plaintiff's Exhibit 6.

Q. By Mr. Warne: Did you ever talk to Mr. Dailard or to Mr. Makeland about the form of bid that was to be submitted?

A. No, there was no conversation pertaining to the bid other than the statement that a bid was being made.

Q. As I understand it, you did not know any of the contents of the bid?

A. I had no knowledge of any of the contents of the bid.

(Testimony of Harold Eames Bishop)

Q. Did you ever say to Mr. Wakeland or to Mr. Dailard, [973] prior to this date of October 30, 1944, or at any other time, that Music Corporation of America controlled 95 per cent of the name bands?

A. No such statement was ever made as to either Mr. Wakeland or to Mr. Dailard. [974]

Q. Or 95 per cent of the bands that are sold in the amusement business, whether name bands or not?

A. No such statement was made.

Q. By the way, have you got a definition of name bands?

A. The name band, in my opinion, is a group of professional musicians who assume a name and are organized in the business of making music professionally and are recognized as such by the public.

Q. And are there name bands, as you understand it, that are known regionally or locally or at all?

A. Yes; I would say that there are name bands that are known in various areas locally and state-wide, Pacific Coast-wide, and nationally.

Q. Do you know bands that operate in a locality and, so to speak, never get out of the locality? A. I do.

Q. And yet operate under a name? A. I do.

Q. Are they termed name bands in the trade?

A. They are termed, to my knowledge, name bands in the trade.

Q. When was it that you first learned that the William Morris Agency and the General Amusement Company, I believe it was, or Frederick Bros., had told Mr. Finley that they would supply him with bands and orches-

(Testimony of Harold Eames Bishop)

tras at the Mission Beach in [975] San Diego if he was successful in his bid?

A. I don't recall the exact time that I learned that. Just roughly speaking, I heard that through just general conversation, approximately two weeks—it might have been as long as four weeks—before the bids were to be submitted finally, that the William Morris Agency and the General Amusement Agency had forwarded letters to Mr. Finley advising that they were interested in submitting their orchestras to his proposed operation at Mission Beach.

Q. Had you done business with representatives of these two other agencies on prior occasions?

A. I had done business with those two agencies, also with the Frederick Bros. Agency, on prior occasions.

Q. In your work, generally, with M. C. A., as we call the Music Corporation of America, had you had occasion to contact the personnel of those agencies from time to time? A. That is true.

Q. And did you have conversations from time to time with the personnel of those agencies with reference to the booking of bands by them at Mission Beach under Mr. Dailard's operation, or at Pacific Square?

A. Mr. Dailard was always interested in obtaining the best known bands it was possible for him to have. Occasionally I would call other agencies, either when there was a lower name band available to our organization or there was no [976] name band or bands of any caliber available for Pacific Square, and ask them if they had any orchestras in the vicinity that were available for booking at Pacific Square; and they would say yes, they did, or no, they didn't. If they said yes, they did, an

(Testimony of Harold Eames Bishop)

arrangement was entered into whereby they were booked at Pacific Square, if it was agreeable with Mr. Dailard.

Q. Did you always get a split commission for doing that? A. Not in all instances; no.

Q. Did you always try to get a piece of the commission in such an instance?

A. I always tried to get a piece of the commission; yes.

Q. You speak of the fact that when you did not have any bands or there were no bands available; what do you mean by that?

A. Well, Mr. Dailard's operation, the policy was to change bands as often as it was possible for bands to be changed; and many times in the handling of the entertainment for his account, or servicing his account, as we call it, we would get up even to two or three weeks before a particular weekend and there would be no bands that our organization could make available for booking at Pacific Square. And at that time I would call all agencies to find out which band, [977] if they had any bands, and if one or two agencies each had a band that was available, which of those bands had the highest caliber I would submit the information on to Mr. Dailard and he would make his decision as to what band to purchase.

Q. How did it come that there would be no M. C. A. bands out here?

A. Well, the bands would be engaged in other sections of the country, or all of the bands that we would have in the Southern California area would be engaged on employment in this area. It was just simply there were just no bands that could be played because they were booked, working at those particular dates.

(Testimony of Harold Eames Bishop)

Q. Some of these bands that were requested might be working in other territories, is that correct?

A. I don't quite understand your question, Mr. Warne.

Q. Well, bands which Mr. Dailard might want to employ and of the caliber that he would want to employ might not be in the Los Angeles territory, do I understand you to say? A. That is correct; yes.

Q. These band leaders and their bands play in various places throughout the United States?

A. They play throughout the United States.

Q. Do you know where the principal market for bands and band leaders in this entertainment is? [978]

A. Well, I wouldn't say that I was an authority on establishing the principal market; but just from the center of population, I would say that probably it would be in the eastern part of the United States.

Q. Were there ever any occasions in the operation of Pacific Square where M. C. A. bands would give way to bands of other agencies?

A. I don't believe, without consulting my records, that I could state here definitely specific instances; but I know that there were instances where a great many bands would be available through other agencies, and a band of lesser caliber was either booked or available through our organization and we would make arrangements to take that band out of Pacific Square, which was our organization, into other employment, so that they would not be deprived of the employment, and have the greater name band to play at Pacific Square.

(Testimony of Harold Eames Bishop)

Q. You say a greater name band and you use the term "a lower caliber" or "higher caliber". What do you mean by that?

A. Well, name bands are of varying denominations in their ability to attract the public; and their attraction to the public also varies according to areas. A band that may be a great attraction here in Southern California and in the Pacific area may not have an attraction in the Middlewest or in the East; it may be localized. And in referring [979] to greater name and lesser name, I am only referring to the bands in this area according to my own interpretation of their name value and drawing power in this area.

Q. Let me ask you this: With reference to booking a band or orchestra into Pacific Square, how long ahead of the playing date would they be booked?

A. We tried to book as far in advance on our orchestras as is intelligently possible to book. I would say that on the average, between six and eight weeks. However, it is not uncommon to have a booking as far ahead as 12 to 16 weeks, if we can project a definite itinerary of an orchestra that far in advance.

Q. When you heard that someone connected with William Morris, Frederick Bros. and these other agencies had submitted letters to Mr. Finley to be used in connection with this bid, did you have any phone conversations with any of them?

A. Yes. I at that time called both representatives of the William Morris Agency and of the General Amusement Agency.

(Testimony of Harold Eames Bishop)

Q. Who did you talk with at the William Morris?

A. At the William Morris Agency I talked with Jack Flynn.

Q. Will you relate the substance of the conversation you had with Jack Flynn?

A. At that time I asked Mr. Flynn or told Mr. Flynn [980] that I had heard that his company had forwarded the letter down to the Finlay Enterprises relative to the support of his endeavors to get the lease. And I told him at that time that according to the information that Mr. Dailard had related to me, that there was little chance of Mr. Finley obtaining, the lease to Mission Beach Park.

Q. Did you mention why?

A. Well, Mr. Dailard had stated to me that his bid, he had been led to believe, was the highest bid that was filed at that time for the operation of the park; and that he felt that his operation in the past was of a satisfactory nature and he saw no reason why the status quo should be upset; and he felt definitely that there was little chance of Finley ever securing the park.

In my conversations with the William Morris Agency—

Q. That is Flynn, again?

A. With Mr. Flynn, I advised him what I had been led to believe by Mr. Dailard; that Mr. Finley was not to secure the park. I told him at that time that it did not appear to me to be sound business for him to be helping Mr. Finley, particularly when there was little chance of him securing the park and there was a chance, if Mr. Dailard found out that he was helping him to secure it, he might be antagonistic toward his future submissions in bands. I told him that we needed, or the bands were

(Testimony of Harold Eames Bishop)

needed for his operation at Pacific [981] Square, and that I hoped that no such relation such as that came up.

Mr. Flynn at that time advised me that he was interested in doing business with both Pacific Square and Mission Beach, and that he would do business with whoever was able to operate at Pacific Square and whoever was able to operate at Mission Beach, and it made no difference to him.

Q. Did Mr. Barnet tell you to make that telephone call?

A. No; Mr. Barnet did not direct me to make the telephone call.

Q. Did you ever tell Mr. Flynn that Mr. Dailard had already obtained the contract from Mission Beach?

A. I never did tell Mr. Flynn that Mr. Dailard had already obtained the contract. Mr. Dailard had represented to me that there was no chance whatsoever of Mr. Finley obtaining the contract, and I reflected that in my conversation to him.

Q. That is, you stated that to him?

A. That is right.

Q. Who was it you talked to at—was it Frederick Bros.?

A. I don't believe that I consulted Frederick Bros.

Q. Was it G. A. C.?

A. It was General Amusement; yes.

Q. Who did you talk to there?

A. I talked with Ralph Wonders, and I also talked with [982] Dick Webster at varying times, continually talking to both of them, both representatives.

(Testimony of Harold Eames Bishop)

Q. All about Mission Beach or in general?

A. In general, about the availability of bands that they had for booking in that area.

Q. Relate the conversation you had with Mr. Wonders.

A. Well, it was substantially the same as the conversation that I had with Mr. Flynn.

Q. That is with reference to your lines. What did he say about it?

A. Well, he told me that he was anxious to see Mission Beach operation flourish in San Diego. He said that he would play his bands with whoever made the highest bids in San Diego; and that was the sum and substance of his answer to me.

Q. You went down there on the occasion when the City Council met, when there was a meeting of the City Council concerning bids, is that correct?

A. That is correct.

Q. Mr. Hal Howard went with you?

A. That is correct.

Q. Drove you down there. Mr. Howard was not present in the Council Chamber?

A. No; he was not.

Q. You were there and a number of other people were [983] there?

(Testimony of Harold Eames Bishop)

A. There was a number of other people in the Council meeting. Actually, I think I got in on about the last quarter of the Council meeting. We did not land in San Diego until around 11 o'clock in the morning, and I would say, all told, I was not in the Council Chambers much longer than 30 to 40 minutes at the most.

Q. Do you recall what occurred there in the Council Chamber while you were there?

A. Do I recall what occurred in the Council Chambers?

Q. Yes.

A. I recall what occurred. I walked in by myself and I took a seat by myself. At that time there was some conversation going on at the Council membership, and subsequently a gentleman stood up somewhere behind me and said that there was a representative of the Music Corporation of America there, Mr. Bishop, and that he thought that some light could be thrown into the matter of the bidding. A gentleman from the City Council stood up and said that there was no need in hearing from a representative of Music Corporation of America; that the only thing that I could testify was that our bands would go to Mr. Wayne Dailard; that Mr. Finley had assured him that he had made all arrangements for all of the name orchestras necessary to the successful operation of Mission Beach Park, and that he could get those bands; and [984] consequently, there was no need in

(Testimony of Harold Eames Bishop)

hearing from any representative of Music Corporation of America. And that was all that was said there. And subsequently, a few minutes after that, the meeting was adjourned and I went on my way.

Q. Had you spoken to Mr. Wakelin or Mr. Dailard or anybody else about going down there and testifying or speaking at the Council meeting?

A. About four or five days before that, Mr. Dailard, in a conversation with me, advised me the exact date that the meeting would be at the City Council. I told him that, as a matter of my own interest, I would like to be present at that meeting, and it was my own decision to be present at that meeting to see what was going on and what the elements in the bids were.

Q. I wonder if you can answer the question I asked you now. Did anybody ask you to come down and make any remarks or make any statements?

A. No one asked me to make any statements?

Q. Did you come there prepared to make any statements?

A. I did not go there prepared to make any statements.

Q. You met Mr. Howard later in the day?

A. I met Mr. Howard later on in the day.

Q. And did you see Mr. Finley later that day?

A. We saw Mr. Finley that evening.

Q. At the Trianon? [985] A. At the Trianon.

(Testimony of Harold Eames Bishop)

Q. Had you seen Mr. Dailard in the meantime, or did you see Mr. Dailard?

A. I saw Mr. Dailard in the afternoon.

Q. Did you see any other customer, if you call them customers, of the places in San Diego?

A. Yes. We went into most of the accounts that we had serviced in the past, such as Sherman's, the Show-Boat, Jimmy Kennedy's place, or two places there; and we covered all the accounts that there was a possibility of doing business with in San Diego that evening.

Q. Well, you saw these other accounts. Did any of them play bands of the caliber—

A. Sherman's plays bands of the caliber of the bands that are submitted to the Trianon or that the Trianon uses. Jimmy Kennedy's, I believe—I have forgotten the exact name; I think it is College Inn—he has two places there. He uses bands of about the same caliber.

Q. And the others were what, cocktail units?

A. The others were small cocktail units.

Q. You had sold units to them from time to time?

A. Units had been sold to them from time to time; yes, sir.

Q. When you went into the Trianon—that is an upstairs ballroom? [986]

A. That is an upstairs ballroom.

Q. When you got upstairs what did you do?

A. We met—there was a gentleman who I hadn't met before, but who Mr. Howard knew, whom he introduced

(Testimony of Harold Eames Bishop)

me to as the manager of the Trianon ballroom. I had a conversation with him for a few minutes. Mr. Howard disappeared. I saw Ken Baker, who was playing at that time at the Trianon ballroom, and I walked across the floor to talk with him and I stepped off the floor to see, to see how many people that the place could properly accommodate, what the capacity of the ballroom was and the dimensions. And then after that, I walked into—I inquired where Mr. Howard was. I walked into the office, where Mr. Howard was with Mr. Finley.

Q. Is Ken Baker one of your bands?

A. Ken Baker is not one of our bands.

Q. Will you just relate everything that occurred, as you can recall it at that time?

The Court: This will be the last question, please.

Mr. Warne: This will be the last question?

The Court: The answer to that question will be a long one and we will hear it this afternoon.

Mr. Warne: Yes, sir.

The Court: We will recess until two o'clock, ladies and gentlemen, and remember the admonition and keep its terms inviolate. Be here at two o'clock.

(Whereupon, a recess was had until two o'clock p. m. of the same day.) [987]

Los Angeles, California, Thursday, February 7, 1946.
2:00 p. m.

The Court: All present. Proceed.

Mr. Warne: If the court please, I am wondering if we can withdraw Mr. Bishop as a witness at this time and put another witness on who is from out of town?

The Court: I think so, unless there is some objection by the other side.

Mr. Christensen: I have none.

Mr. Doherty: In fact, I had in mind, your Honor, calling a witness from out of town and, with your Honor's permission, finishing up with Mr. Dailard so he can go about his business.

The Court: Very well.

Mr. Doherty: Mr. Simpson.

FRED W. SIMPSON,

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Fred W. Simpson.

Direct Examination

By Mr. Doherty:

Q. Mr. Simpson, you speak loud enough so I can hear you and I am sure every juror will hear you if I can. Where do [988] you reside? A. San Diego.

Q. How long have you been a resident of San Diego?

A. About 33 years. I came there in 1913.

Q. What business or occupation are you in?

A. I am in the automobile parts and service business?

(Testimony of Fred W. Simpson)

Q. What type of business is that and who do you represent?

A. We represent a division of General Motors called United Motors Service, which is a branch of General Motors Corporation, in their lines; and the Auto-lite Company, which is a division of the Chrysler Corporation.

Q. And how long have you been in that business in San Diego? A. 27 years.

Q. Did you ever hold any public office in San Diego?

A. Yes.

Q. What office was that? A. City Councilman.

Q. And from what time to what date were you a member of the City Council?

A. From 1939, about July, 1939, to June, 1944.

Q. Are you a member at this time? A. No.

Q. How did you come to sever your connections with the [1989] City Council?

A. I resigned from the Council to take a position as a director of the newly-formed Water Authority, San Diego. That Water Authority, you know, is to bring in Colorado River water to the San Diego area.

Q. Sort of a water commission? A. Yes.

Q. Or part of Metropolitan Water District?

A. Yes. We expect to annex to Metropolitan Water District of Los Angeles.

Q. Do you hold any state office or position?

A. Yes. I am a member of the Colorado River Board of California.

Q. And by whom is that office named?

A. The Governor appointed me, Governor Warren.

Q. And you still hold that office? A. Yes.

(Testimony of Fred W. Simpson)

Q. Are you familiar with the Mission Beach Amusement area? A. Yes.

Q. Where was your councilmanic district located with respect to that area?

A. I was councilman for the First District, which comprises that area, La Jolla, the beach area, and Point Loma residential area and the Mission Hills residential area. [990]

Q. Is that district composed primarily of residential or industrial business? A. Primarily residential.

Q. And the area immediately adjacent to the Mission Beach Amusement Park, is that also residential?

A. Yes.

Q. What type of residences in there and what class of people reside in that area?

A. Most of the people are older, a large percentage are retired people that live at Mission Beach, in the residential area of Mission Beach.

Q. Do you know Mr. Wayne Dailard? A. Yes.

Q. How long have you known him?

A. About 15 years, I think.

Q. When did you first become acquainted with Mr. Dailard?

A. Oh, about 15 years ago. I got well acquainted with him during the World Fair that was conducted in Balboa Park at San Diego during the years of 1935 and '36.

Q. What connection did he have with the World's Fair? A. He was the manager.

(Testimony of Fred W. Simpson)

Q. And what did you know about the Mission Beach Amusement area during the time that you were councilman, before Mr. Dailard secured a lease? [991]

A. Well, I know that when I went on the Council, the operation at Mission Beach, which was then operated by the city, was very poor; it was very unsatisfactory to the City officials, at least.

Q. In what respect was it unsatisfactory?

A. Oh, the sanitary conditions around the area were very bad, poorly managed, and apparently, incompetent management.

Q. Were you a member of the Council at the time that the City Manager made a lease with Mr. Dailard?

A. Yes, sir.

Q. How often would you visit the Beach, the ballroom, and the Beach recreation area? When I say the Beach, I mean Mission Beach, on the average while you were a councilman?

A. Oh, I would say three or four times a month.

Q. What times, what hours would you visit?

A. Well, occasionally I would go in the evening, usually in the afternoon, but whenever I had occasion to go to public functions and one thing and another at the ballroom in the evening. I would attend.

Q. Did you go into the ballroom during the time that they had dances there? A. Yes.

Q. And also, about the park? [992] A. Yes.

Q. You know what hard liquor is, don't you?

A. Yes. [993]

Q. I mean whiskey, gin, distilled spirits?

A. Yes.

(Testimony of Fred W. Simpson)

Q. During Mr. Dailard's operation of Mission Beach was there any hard liquor or any mixed drinks, to your knowledge, sold in the ballroom? A. No.

Q. Was there any hard liquor in any form, while Mr. Dailard had the operation of Mission Beach, sold in the area under his jurisdiction? A. No.

Q. Was there a beer concession there? A. Yes.

Q. Was there any hard liquor sold in bottles, that is, in the original package in the Mission Beach area under Mr. Dailard's jurisdiction, in any form? A. No.

Q. Now, during the operation of Mr. Dailard, did you have complaints respecting the Mission Beach Amusement Park from the citizens of your district?

A. Well, there were some complaints from the residents in the area, people that wanted to live quiet, they did not want the noise of the Amusement Park in the area at all. I have had those kinds of complaints, if you want to call them complaints.

Q. What was the position or attitude of those people [994] who complained to you?

A. That they didn't want the noise attendant to an amusement park so near to where they live.

Q. What did they want done with the property?

Mr. Christensen: That is objected to as calling for hearsay, and I object on that ground.

The Court: The way it is framed, it does. The objection is sustained to the question.

Q. By Mr. Doherty: I will get at it this way, Mr. Simpson: You have just testified that you had complaints from people who objected to its being run as an amusement park. Did these people have any objection

(Testimony of Fred W. Simpson)

or express any objection to the method of operation by Mr. Dailard?

Mr. Christensen: That is objected to as calling for a conclusion and opinion, and on the further ground it calls for hearsay.

The Court: I think so. We will be getting into collateral matters. Sustained.

Mr. Doherty: May I make one inquiry of your Honor?

The Court: Yes.

Mr. Doherty: Plaintiff's testimony was from the mayor and two councilmen, that they had received numerous complaints from the citizens about Mr. Dailard's operation. It is only directed to that point.

The Court: The ruling still stands. [995]

Mr. Doherty: Pardon me, your Honor?

The Court: The ruling still stands.

Q. By Mr. Doherty: Mr. Simpson, did you observe during Mr. Dailard's operation anything about it which caused you to be critical or complain respecting it? I am speaking of you as a city official.

A. Would you please repeat that question?

Q. I probably did not state it as accurately as I might. As a member of the City Council, in your inspection of the Mission Beach area under Mr. Dailard's jurisdiction, what complaint, if any, did you have to make respecting the method and the manner of his operation?

A. I had no complaint.

Q. Did you receive any other complaints respecting the operation other than from the people in the area that

(Testimony of Fred W. Simpson)

you have spoken of who wanted it abandoned as an amusement park?

A. Yes, I had two written complaints. They were—the first one was because Mr. Dailard's operation had rented the ballroom to a colored organization to conduct a colored band, and they allowed white people in with the colored people in the ballroom at that time. That was a complaint I had received in writing.

Then I had another one, which was directly opposite, a complaint from some people because Mr. Dailard would not allow the use of the ballroom to another colored organization for the [996] same purpose, because of the complaints, I presume, he had on the first one.

Q. Were those the only two complaints you received respecting Mr. Dailard's operation for the five years you were councilman?

A. Yes. There were, of course, some, as you usually have in a position of that kind, when Mr. Dailard first took it over, and I didn't pay any attention, very much attention to them, because I charged them to jealousy, from people that wanted—they had had the management of the place, they were in the City employ previously, and I presume they were just disgruntled because they didn't have the management any longer.

Mr. Christensen: May that be stricken as his opinion or conclusion?

The Court: No, I think it will stand. Motion denied.

Q. By Mr. Doherty: Had you finished your answer, Mr. Simpson? A. Yes.

Q. Who preceded Mr. Knox as mayor of San Diego?

A. Immediately, Dr. Bard.

(Testimony of Fred W. Simpson)

Q. For how long did he serve?

A. He served from the time of the death of the late Mayor Benbough, and I don't remember exactly the date; I believe it was in November of 1943; in November, as well as [997] I can remember it. It was along about there.

Q. He served just in the interim period until the election was called? A. Yes.

Q. How long had Mayor Benbough served as mayor?

A. I think he was first elected in 1935, and then reelected and did not finish the second term.

Q. You, of course, knew Mayor Benbough?

A. Very well.

Q. And were you a member of the City Council during the various terms of office? A. Yes.

Q. Did you receive any complaints from other members of the Council respecting the operation of Mission Beach by Mr. Dailard during any of your term of office?

A. Yes. When the present Mayor Knox was councilman, he complained not of Mr. Dailard's operation, but of the papers strewn on the beach in front of the Amusement Center.

Q. Did you hear any comments or statements by Mayor Benbough, or other members of the Council, respecting the efficiency or lack of efficiency that Mr. Dailard evidenced in the operation of the lease?

A. No. Most of the expressions I heard were very complimentary to Mr. Dailard at that time.

Q. I believe, Mr. Simpson, you had an ambition to be [998] mayor of San Diego?

A. That is correct.

(Testimony of Fred W. Simpson)

Q. And you ran against Mayor Knox?

A. That's right.

Q. And you were defeated? A. That's right.

Q. Who was your campaign manager?

A. Mr. Dailard.

Mr. Doherty: Cross-examine.

Mr. Christensen: No cross-examination. Step down.

The Court: That is all, Mr. Simpson.

Mr. Doherty: I will call Mr. Dailard.

WAYNE W. DAILARD,

called as a witness by and on behalf of the defendants,
having been previously duly sworn, was examined and
testified as follows:

Direct Examination

By Mr. Doherty:

Q. Mr. Dailard, you have already been sworn and testified in this case. I believe you have testified previously, in substance and effect, that you took over the Mission Beach some time, I think, in either 1940 or 1941?

A. That's true.

Q. During the time that you operated at Mission Beach what hard liquors, in the sense of hard liquors I mean distilled [999] spirits, whiskey, gin, and so forth, were served in the ballroom at Mission Beach?

A. None.

Q. During the time that you operated Mission Beach what hard liquors in any form, container or otherwise, mixed or otherwise, were sold or served in and about the Beach area under your jurisdiction? A. None.

(Testimony of Wayne W. Dailard)

Q. What form of drinks, while you were operating the ballroom, were served in the ballroom during your operation?

A. Soft drinks, bottled soda goods. I think at one time during our period there was a soda fountain that operated. I think in later years that was reduced to bottled goods only; that is bottled soft drinks.

Q. Was there any beer served or sold in the ballroom—

A. No, sir.

Q. —during your operation at any time?

A. No, sir.

Q. Was there any wine served in the ballroom?

A. No, sir.

Q. Was there a beer concession on the Beach area or the Recreation area?

A. Yes.

Q. What did they sell at that concession?

A. Beer and wine. [1000]

Q. Original packages or—

A. Over the counter.

Q. Over the counter?

A. Or over the bar, whatever you want to call it.

Q. Mr. Dailard, you are familiar with the population trend in San Diego from 1940 up to 1945?

A. Yes, sir.

Q. What was the official population figure for San Diego in 1940?

Mr. Christensen: To which we object as not the best evidence.

The Court: I suppose in a sense there has been an enumeration, Major.

Mr. Doherty: I would say that is correct, your Honor.

(Testimony of Wayne W. Dailard)

The Court: You ought to be able to stipulate on that, gentlemen.

Mr. Christensen: Yes, I have the figures.

The Court: That should not require testimony.

Mr. Doherty: Let me see if you have the figures that Mr. Simpson told me.

Mr. Christensen: No, I don't have those.

(Thereupon a document was handed to counsel.)

Mr. Doherty: I will take your figure here for the population for 1940, which is almost what Mr. Simpson told me, about the same, but I cannot accept all the other pages of [1001] figures of your breakdown.

Mr. Christensen: Then you get yours, will you, please, sir?

The Court: The objection is sustained.

Q. By Mr. Doherty: Mr. Dailard, was there a pronounced increase in population beginning with 1940?

A. Yes.

Q. Consisting of what classes of people?

A. Service people and aircraft workers.

Q. From your observation there, to what extent did the population increase during the four years from 1940 to 1944, inclusive? That would be five years.

Mr. Christensen: To which we object as calling for a conclusion and opinion, and not the best evidence.

The Court: That is true. There was an enumeration there last year, as I remember. That is available, of course.

Mr. Doherty: It was only an informal enumeration, your Honor, as compiled by some organization there, and no more official than any other layman's.

(Testimony of Wayne W. Dailard)

The Court: I think it was semi-official. As I recall, it was a semi-official enumeration.

Mr. Doherty: If your Honor would give me the statement of what it was, I would accept it as evidence.

The Court: I cannot do it from the bench. I have a memorandum in chambers, I think, that could be referred to. [1002]

Q. By Mr. Doherty: Were there not a great number of more people around the streets than there were when you first took over the concession? A. Yes, sir.

Q. Do you know whether or not there was any increase in the police force? A. No. [1003]

Q. Do you know whether or not, from your own observation and knowledge, some of the policemen were taken into the Service?

Mr. Christensen: Well, that is objected to as calling for his conclusion and opinion.

The Court: Read the question, Mr. Reporter.

(Question read by the reporter.)

The Court: Oh, I think that is a matter of such common knowledge that anyone who is familiar could express a view. Objection overruled.

A. Yes.

Q. By Mr. Doherty: Was there any other increase in the police force? A. Not that I know of.

Mr. Christensen: To which we object as calling for his conclusion and opinion, not the best evidence.

The Court: Yes, that is a matter of record, of course. Sustained. He said, not that he knew of, anyhow, so that would not be evidential.

(Testimony of Wayne W. Dailard)

Q. By Mr. Doherty: Under your observation of the conditions in San Diego from 19—we will say—43 and '44 was there an apparent increase, we will say, in drunkenness? A. Yes.

Q. And was it confined to any particular area?

A. No. [1004]

Q. And would that condition sometimes evidence itself at Mission Beach? A. Yes.

Q. Would it be consistent, or periodical, or a hit or miss? A. Apparently in cycles.

Q. What do you mean by that?

A. There would be periods of very good deportment on the part of people attending, and for periods of four and six weeks, and then there would be two or three days and weekends where there would be rowdy groups, ten or 12 in a group, defense workers, or of servicemen, that would come in and they were drunken.

Q. What steps did you take to correct that?

A. Well, our first appeal, naturally, was to the Police Department for help.

Q. And what else did you do?

A. Appealed to the Shore Patrol, if the offenders were service people.

Q. Did you make any complaint to any City official?

A. Yes.

Q. To whom? A. The City Manager.

Q. And who was City Manager at that time?

A. Walter Cooper. [1005]

Q. And what did you report to him?

A. Well, we reported to Wally that under our lease the responsibility of the policing of Mission Beach was

(Testimony of Wayne W. Dailard)

the City's; and we merely asked him to fulfill their part of our agreement; that was to give us adequate police protection when we needed it and called for it.

Q. And what did Mr. Cooper tell you?

A. He said he hadn't—

Mr. Christensen: That is objected to as hearsay.

The Court: Well, I think so. Mr. Cooper is dead. Sustained.

Q. By Mr. Doherty: When was Mr. Cooper killed, if you know, Mr. Dailard?

A. In December, I believe, of 1943—no; 194—

The Court: 4.

A. —4, that is correct. Thank you, sir.

Q. By Mr. Doherty: He was killed in an airplane accident out here near Lockheed Airport?

A. That is correct.

Q. Were any steps taken by the City or Mr. Cooper, if you know, to remedy the situation?

A. None that were ever apparent. At one time, they had—I don't know the exact dates, but along some time in 1942 they took out the patrolman that we had assigned to the park. They had two men there, if my memory serves me correct- [1006] ly on about 16-hour shifts. They pulled those men out and there was a time we had no protection. During that period we employed bonded policemen.

Q. Who employed them? A. We did.

Q. And who paid for them? A. We did.

Q. For what purpose?

A. For patrolling the grounds, attempting to keep order.

(Testimony of Wayne W. Dailard)

Q. There has been some testimony here about the bath house being turned into a brig. Do you know anything about that?

A. Yes. My partner, Mr. Wakelin, and myself arranged with, I believe, Commander Gallagher, who was in charge of the Shore Patrol at that time. The problem we had to meet was this: That the City prowler car would drop in a time or two during the evening and if we had servicemen, that their deportment was bad, the only thing the prowler car could do was to ask these boys to leave the grounds. In other words, the one prowler car during that particular period of time was covering La Jolla, Pacific Beach, Mission Beach, Ocean Beach and parts of Point Loma; and the logic behind it was that if they were tied up, taking some disorderly service people into San Diego to book them, that the entire area out there constituting probably a half of San Diego's population was without a patrol car. So, [1007] to meet that—I think the Chief of Police had considerable hand in it—we created our own brig. I say “we” meaning the three forces, the Chief of Police, the Navy and the management of Mission Beach. That was simply to detain those fellows until the patrol wagon could come and pick them up, the patrol wagon or the Navy patrol.

Q. In other words, the bathhouse was then used as a sort of temporary holding spot?

A. Yes. The bathhouse was selected because the Navy was patrolling the entire plant, anyway, for the training of their recruits; so, really, the entire building was under Navy management.

(Testimony of Wayne W. Dailard)

Q. That was pursuant to arrangement, you say, with the Navy and the Chief of Police?

A. That is correct.

Q. How long did that continue?

A. I think it still continues. At least, it was in effect up to the time our lease expired.

Q. There was some testimony here by, I think, Mayor Knox that you had a meeting with him. Do you remember the approximate date?

A. The only meeting on the subject of Mission Beach was early in the spring of 1944.

Q. Who was present at that time?

A. Mr. Cooper. [1008]

Q. The City Manager? A. Yes, sir.

Q. What were the circumstances under which you had this meeting?

A. There was a dual circumstance. Mr. Cooper wanted to see any existing agreements that we had or agreement that we had with the Music Corporation, knowing that the lease was coming up for some sort of a renewal the following year. My purpose in requesting the meeting was to attempt to persuade the City Manager to extend my then existing lease through the year 1945.

Q. And where did you meet?

A. The meeting started, as I recollect, in Mr. Cooper's office, which was on the second floor, I believe, of the Civic Center Building.

Q. And where did you meet with the Mayor?

A. I don't remember the details, but it seems to me that the Mayor came in and that we all went up to his office, up in the penthouse on the Civic Center Building. Now, that couldn't—it could have been in some other

(Testimony of Wayne W. Dailard)

manner, but the contact with the Mayor was established after I got in the meeting with Mr. Cooper.

Q. And did you discuss the lease and extension?

A. The first thing, we analyzed the agreement. Mr. Cooper had never been familiar with the type of arrangement [1009] we had on the booking of our bands. He read the agreement and explained it to Mayor Knox. It is my recollection that Mayor Knox did not read the agreement but there was some discussion of it. Cooper pointed out to him the type of an arrangement that we had; that it was an optional agreement having a—after he read it, he explained it to the Mayor.

Q. During that conversation with the Mayor what complaint, if any, was made by him respecting the method or the manner in which you had been operating Mission Beach Park?

A. There was no complaints. He was opposed to extending the present lease, but at that time it was not on a basis of any complaints.

Q. Did he give the reason why he opposed the extension of the lease?

A. His reason at that time was that he felt that if it was continued, if the City decided to continue Mission Beach as an amusement park and not develop it into a recreation center—there was a great deal of talk at that time of turning it into a Jones Beach idea, making it a recreation center for shuffleboard and taking out the carnival and the midway atmosphere. At the time that Mayor Knox and I discussed it, he said he had not made up his mind what his stand would be on it, but if it were leased, that he definitely would put it up to bids; that he would not extend [1010] my present lease.

(Testimony of Wayne W. Dailard)

Q. Did you have any further conversations with the Mayor respecting it at any time?

A. I don't recall of any. There might have been a casual discussion of it at Rotary Club or something of that type, but I do not remember of any specific meeting on that part, and I feel that I would have remembered had we had it, or my appointment book would show it.

Q. Mr. Austin, a City Councilman, and Mr. Crary, a City Councilman, testified here. What complaint, if any, did they ever make to you respecting the manner or method in which you were operating Mission Beach?

A. Well, none that I know of. I don't know that I have ever met the senior Mr. Austin. I may have, years ago. Mr. Crary has never registered any complaint with me. I am sure he did not. I only remember of having met the man on one occasion.

Q. What is the answer to my question: What complaint if any, did they make to you?

A. To me, none.

Q. You filed a bid, did you not, for Mission Beach?

A. Yes, sir.

Q. And after you filed that did you contemplate going through with it or withdrawing it?

A. We officially—we started to withdraw it. As a [1011] matter of fact, we made the announcement to the press that we were withdrawing it.

Q. What reason did you have for wanting to withdraw it?

A. We sensed—

Mr. Christensen: To which we object as being immaterial to any issue here, self-serving.

The Court: Overruled.

A. We sensed a political opposition and—

(Testimony of Wayne W. Dailard)

Mr. Christensen: I ask that that be stricken as a conclusion and opinion of the witness.

The Court: You were asked that question, Mr. Dailard, and then you use the plural first person pronoun in answering it. I think that would not be in answer to the question.

A. I sensed a political reaction. And may I explain at this time, that the Mission Beach, the profit that I derived personally from Mission Beach meant very little to me in dollars and cents, inasmuch as I had to consider it as added income. My own ventures, such as I had mining interests, I had Pacific Square, and my ranch were considered first revenue, because I owned those properties. In the \$35,000 to \$40,000 yearly that I derived from Mission Beach I only retained probably \$3,200 of that; and I had come to the point of thinking where the amount of money that I retained was not worth the petty political battle to get it.

Now, that was my thinking at the time that we announced [1012] our intentions to withdraw.

Q. By Mr. Doherty: Did you have a conversation with the City official respecting your intention?

A. Yes.

Q. Who was that? A. Walter Cooper.

Q. At that time City Manager?

A. That is correct.

Q. Now, you can't say what Mr. Cooper told you. But you did have a meeting with him? A. Yes.

Q. And after that meeting what decision did you come to?

Mr. Christensen: Now, that is objected to as being immaterial to any issue here, self-serving.

(Testimony of Wayne W. Dailard)

Mr. Doherty: I withdraw it.

Q. Just make your decision. What decision did you come to respecting the letting the bid stand or withdrawing it after your conversation with Mr. Cooper?

A. After our conversation with—after my conversation with Mr. Cooper, I decided to leave the bid stand.

Q. In that conversation with Mr. Cooper—don't try to answer this until his Honor has a chance to rule, because it may come within a forbidden topic. In this conversation with Mr. Cooper what, if anything, was said by him respecting [1013] the probability of you being awarded the bid?

Mr. Christensen: To which we object as calling for hearsay.

Mr. Doherty: It is only leading up to the Ames Bishop conversation, your Honor.

The Court: Well, I think probably it is admissible. The witness is charged as a co-conspirator here and he has a right to put before the jury his situation. The fact that Mr. Cooper is dead, I do not think should prevent him from revealing his attitude to the jury. Objection overruled.

The Witness: Will you read the question again, please?

(Question read by the reporter.)

A. Mr. Cooper told me at this meeting that he had just finished a private checking or investigation of Mr. Finley; he had also analyzed the relationship of the two bids. He said, in his opinion, the bids were so closely identified as to terms, even though ours was a bit greater, that in normal procedure it would be referred to him for

(Testimony of Wayne W. Dailard)

decision; that in any other closely-knit proposals that had been offered to the City, that procedure had been followed by the Council; it had simply been referred to him for decision.

He said, "While I am not giving you any preference, only insofar as your ability and financial standing and record merits it," he says, "I can't understand how the administration can award a political football, as it were, to a man who has [1014] not had a sufficient background in the business. It would be too dangerous."

He said, "I want you to leave your bid in. It, in all probabilities, will be referred to me, and I certainly shall not award it any other way than to the most reliable and the better experienced bidder."

Now, that was the basis. That is not verbatim, but that is the substance of the conversation.

Mr. Christensen: I ask now that that be stricken as hearsay. I am absolutely unable to cross-examine or to refute it, and it is apparently hearsay.

The Court: The motion will be denied. You are unable to produce Mr. Cooper, that is true, but that should not foreclose the witness whom you have charged with being a co-conspirator from giving to the jury his version concerning the reasons for the submission of the bid.

Mr. Christensen: Your Honor has in mind the fact the bid has already been submitted when this conversation took place?

The Court: Yes. The bid itself, within its four corners, is not the subject matter of the inquiry. The subject matter of the inquiry is his attitude and relation with respect to the submission of that bid.

Mr. Doherty: May I proceed, your Honor?

(Testimony of Wayne W. Dailard)

The Court: Yes, sir.

Q. By Mr. Doherty: Mr. Dailard, after this conversation [1015] with Mr. Cooper, the City Manager, did you have a conversation with Mr. Ames Bishop, the defendant in this case?

A. Yes; I called Mr. Bishop. I don't remember the—I know that I called him for some other cause. I called him and told him in substance, I told him that our chances were very much improved in obtaining the lease on the Beach; that, as a matter of fact, it looked very, very good at that time.

Q. Mr. Dailard, you have already testified respecting the profit from the operation for 1941, '2, '3 and '4 from Mission Beach. I am handing you your records, and you give me the answers from those documents.

Mr. Christensen: Have you shown those to me at any time heretofore, Mr. Doherty?

Mr. Doherty: No, I have not. He has testified to the totals in response to your inquiries, and I am only having him look at them rather than have him give his estimates. Now, if you wish to examine them or stand by him when he checks them, it is agreeable to me, and you can have access to them, because the inquiry I am going to make has already been testified to in part and I just want to break it down into different headings. I will ask the first question and then your Honor will get the trend.

Q. Have you before you, Mr. Dailard, the records showing the amount of income, gross income, from the ballroom for the year 1943? [1016]

A. Yes, sir.

Mr. Christensen: Just a minute. May I ask the witness on voir dire a question?

(Testimony of Wayne W. Dailard)

The Court: Yes, sir.

Q. By Mr. Christensen: Those are not the books of the original entry, are they, that you have?

A. No. They are statements.

Q. You do have the books of original entry?

A. Yes; we have them.

Q. They are not here in court, are they?

A. I don't think so.

Q. They are not here available to my inspection, are they?

A. I don't know.

Q. You did not yourself prepare that?

A. No, sir.

Mr. Christensen: I object to its use.

The Court: It has not been used yet. I am not anticipating anything. It has not been used yet, Major. I am not making anticipatory rulings in this case.

Q. By Mr. Doherty: Independent of the memorandum you have in front of you, Mr. Dailard, do you know approximately what the gross income from the ballroom was for the year 1943?

A. For the year 1943? [1017]

Q. Yes. No; you can't look at your memorandum.

The Court: He has asked you if you have an independent recollection. If you haven't any, why, say so.

A. No .

Q. By Mr. Doherty: Can you tell me the amount of income from the ballroom for the year 1944?

A. Approximately 153,000.

Q. And what were your total expenditures chargeable to the ballroom for 1944?

Mr. Christensen: We submit it is not the best evidence, the better evidence being available, as disclosed.

(Testimony of Wayne W. Dailard)

The Court: There is better evidence; that is true. He has a set of books and he kept them, and on the strength of those he did business and undoubtedly made his fiscal returns to the appropriate agencies.

Mr. Doherty: I will have to have Mr. Dailard step aside, and I will see if I can get his books here for counsel.

Mr. Christensen: Would you like me to cross-examine on the matters and things you have heretofore inquired about?

Mr. Doherty: Yes. Proceed up to the present time, and we will finish the other off later.

Cross Examination

By Mr. Christensen:

Q. Mr. Dailard, Mr. Cooper was the City Manager at the time Mr. Finley was awarded the lease on Mission Beach, wasn't [1018] he?

A. That is correct, sir.

Q. And he is the one that awarded it?

A. No; I don't think he had any voice in it, Mr. Christensen.

Q. Did you notice whose signature was signed to the lease?

A. No. It was never referred to him, I know that.

Q. How would you know that?

A. Matter of record.

Q. What record are you referring to?

A. The Council record.

Q. Have you the Council records?

A. No. You asked me how I knew it. I told you "a matter of Council records".

(Testimony of Wayne W. Dailard)

Q. All right. Tell me, these were sealed bids that you and other bidders were required to make, weren't they?

A. Yes.

Q. To be opened on November the 8th of 1944?

A. That is correct. That is correct.

Q. Oh, yes. You told us about all your other interests. Will you tell me what other interests you had during the year 1944?

A. For the year 1944?

Q. Yes, sir. [1019]

A. I was operating the ranch.

Q. Where was the ranch, sir?

A. El Cajon Valley.

Q. Briefly, what kind of a ranch was it in size?

A. We raised fur-bearing sheep, Curacao sheep.

Q. What size ranch?

A. We had 34 acres that we owned and we had some 370 acres lease.

Q. Now, the ranch and what other interests?

A. There was a period. What year did you say?

Q. 1944, sir?

A. There was a period in which we were in what was known as the Collonades Corporation, operating Casino Gardens.

Q. When were you in that?

A. Some time, as I remember, during the spring and into the fall of 1944?

Q. How long were you there?

A. I can't answer that. It was—I can't answer it accurately. As a guess, I would say from April to September.

(Testimony of Wayne W. Dailard)

Q. And continue now?

A. And we had Pacific Square, Limited, and Mission Beach.

Q. What else?

A. Well, that was the only direct operational.

Q. You told us about the other sources of income and [1020] other interests. Will you continue?

A. That was through interests in other business. I had some mining stock at that time.

Q. Just mining stock, you say? A. Yes.

Q. Did that require any of your attention?

A. Some, yes.

Q. And you had some polo ponies, too?

A. Yes.

Q. That required some of your attention?

A. Yes, sir.

Q. What else? A. That is all I can think of.

Q. You actually spent a very small percentage of your time at Mission Beach, didn't you? A. Yes.

Q. Not over, say, ten per cent? A. About.

Q. And you say that the income derived from the operation of Mission Beach was a minor consideration to you?

A. I did not say it was a minor consideration.

Q. Well, I might have characterized it as that, but you correct me and tell me what it was.

A. I simply stated a very plain tax fact which is manifest in the figures that you have in your possession. [1021]

Q. Well, go ahead and tell me, sir.

A. What do you want to know?

(Testimony of Wayne W. Dailard)

Q. That income was of little importance to you, then?

A. Correct, sir.

Q. Now, you know, of course, Mr. Dailard, that there has never been any jail or place of detention at Mission Beach Amusement Center since Mr. Finley had the place, don't you?

Mr. Doherty: Not proper cross-examination.

A. I don't know.

Mr. Doherty: Object on that ground.

A. I didn't make that statement. I said I knew it was in operation up to the time that our lease expired. [1022]

Q. Well, it was there while you had it, though?

A. I testified to that.

Q. Yes. Now, tell me when did you have these, as you call them, bonded policemen, Mr. Dailard?

A. Intermittently throughout the time of the operation. That would take a check of the records. We did business first with Mr. Sheridan, who had the bonded police patrol. I would say that was intermittently throughout the life of our agreement. I think our records would substantiate that.

Q. What do you mean by "intermittently"?

A. During the peaks of the operation, or during periods when they were needed, when the City was not able to furnish us with the proper protection.

Q. You did, however, appeal to the City authorities for police protection there, didn't you? A. Yes.

Q. You did that on a great number of occasions, didn't you?

A. I know—I feel confident that my partner did. I know that on at least four occasions that I made—and

(Testimony of Wayne W. Dailard)

I think they ran from the last, the end of the summer of 1943 up through the summer of 1944, that I personally talked with Mr. Cooper about it.

Q. That was on account of fighting and intoxication?

A. Yes. [1023]

Q. On account of morals conditions, too, was it?

A. Not that I know of.

Q. You permitted hard liquor in the park there, did you?

A. Well, not—no more than you would permit hard liquor in the court room. We sold no hard liquor. Whenever we saw any evidence of it we had it removed.

Q. You knew it was there though, didn't you?

A. Not of my own knowledge, I do not. Any more than at 5th and Broadway. I saw bottles at 5th and Broadway downtown. I saw them carrying them in their hands.

Q. Now, you spoke of the Senior Mr. Austin. To whom are you referring?

A. Mr., I believe, Walter Austin.

Q. He is a member of the City Council, is he?

A. Yes.

Q. At that time they had two Mr. Austins, they had Walter Austin and—

A. And Mr. DeGraf Austin.

Q. And Mr. DeGraf Austin?

A. That is correct.

Q. And when you mentioned the Senior Mr. Austin you were thinking of Mr. Walter Austin? A. Yes.

Q. I see. You were not referring to any person who has [1021] been here in the courtroom, either as a witness

(Testimony of Wayne W. Dailard)

or otherwise, when you said the Senior Mr. Austin, were you?

A. I think Mr. Walter Austin was here the first day, was he not? I am asking you. I was not here.

Q. Well, I didn't see him.

A. I have understood from reading the transcript that he did testify here. Does that answer your question?

Q. You have read the transcript? A. Yes.

Q. When did you do that?

A. I don't know; I don't know. Wednesday.

Q. You mean you were reading over your testimony?

A. Yes.

Q. And the testimony of other persons who have appeared here? A. Yes.

Q. And, of course, you discussed what you would be asked— A. Certainly.

Q. —and what answers you were going to give?

A. Certainly.

Mr. Christensen: That is all. Thank you, sir.

Redirect Examination

By Mr. Doherty:

Q. Mr. Dailard, do you know Mr. Warner Austin? [1025] A. Yes.

Q. How long have you known him?

A. Why, I met Mr. Warner Austin for the first time in the World's Fair of 1934.

Q. You have known him ever since?

Mr. Christensen: To which we object as not proper re-direct.

The Court: Overruled.

The Witness: Yes.

(Testimony of Wayne W. Dailard)

Q. By Mr. Doherty: What was his occupation or calling before he went to work for Mr. Finley, if you know? A. He was a city fireman.

Q. Employed by whom?

A. The City of San Diego.

Q. A uniformed fireman? A. Yes, sir.

Q. How long had he held that position, to your knowledge?

A. To my knowledge, he held it, and I have a knowledge because he used to inspect—used to be, at least in uniform, in Pacific Square for, I would say, at least six or seven years out of the ten years that I have known him, or rather, the eleven years that I have known him.

Mr. Doherty: That is all. [1026]

Recross Examination

By Mr. Christensen:

Q. He booked two of his bands in there to play at your Mission Beach Ballrooms? A. Of his bands?

Q. Yes. A. Did he have bands?

Q. Will you answer the question, instead of asking one?

A. Not that I know of. I know that he booked a mortuary girls' band; that he was working for a mortuary that had a little girls' band, and they called them the Merkeley Maids, and he booked them, not with us, but through some local organization to play in Pacific Square, yes.

Q. You know he had two bands, don't you?

A. I do not.

Q. You know he was a lieutenant in the fire department? A. I didn't know that.

Q. And that his job was that of public relations, do you not? A. It wasn't when I first knew him.

(Testimony of Wayne W. Dailard)

Q. When was that?

A. During the 1934 World's Fair. He was a fireman sitting in front of the fire-house.

Q. Well, after that? A. I don't know. [1027]

Q. You never saw him after 1934?

A. Yes, I saw him.

Q. Don't you know that his job was—

A. I said, "No."

Q. You don't know that? A. No.

Q. Have you made any effort to learn?

A. No, sir.

Q. You know that he organized at least 1500 shows for the U. S. O., don't you?

A. I didn't know that.

Q. You are not very well acquainted with him, are you?

A. I know the man. I answered the questions as they were asked me.

Q. Do you know that he has a license as a broker?

A. I didn't know that.

Q. Didn't you know that? A. No.

Mr. Christensen: All right. Thank you.

Redirect Examination

By Mr. Doherty:

Q. When did you last see him in a fireman's uniform about Pacific Square?

A. It seems it was after the first of the year. No, it was in the fall, I believe, of '44. [1028]

Q. Of 1944? A. I think so, yes.

Mr. Doherty: That is all.

Mr. Christensen: That is all.

Mr. Warne: Mr. Bishop, will you resume the stand?

HAROLD EAMES BISHOP,

called as a witness by and on behalf of the defendants, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination (Continued)

By Mr. Warne:

Q. Mr. Bishop, at the time we recessed for the noon recess we had just arrived, I believe, in Mr. Finley's office in the Trianon Ballroom. It was in an office there?

A. That's right.

Q. And Mr. Howard was there, yourself, and Mr. Finley, and you believe there was some other party; is that correct? A. That is correct.

Q. Now, just relate what was said by you, Mr. Howard, Mr. Finley, and what transpired there, as you now recall?

A. As I recall, when I walked into the office Mr. Finley stated, "Well, now that"—I don't recall whether he stated that he had Mission Beach or that it looked as though he was going to have Misison Beach, but he said, "What about bands?" And I explained to him at that time that we had a [1029] contract calling for first refusal of our orchestras with Pacific Square, and that in the event there were orchestras available for him in addition to those to supply the Pacific Square, we would be happy to submit those orchestras to him. I told him that I was very skeptical about the supply of orchestras for the two ballrooms because we were even having considerable difficulty supplying calibre bands for the Pacific Square operation.

Mr. Finley at that time said, "The prices, as I understand it, that you are charging at Pacific Square are

(Testimony of Harold Eames Bishop)

considerably out of line, so far as the value of the bands are concerned," and he said, "If and when you are going to do business with me, you are going to do business with me under my terms, under the prices that I consider as the value of the orchestras."

I explained at that time to Mr. Finley that so far as the price on the orchestras, the price on orchestras was one which was set by the orchestra, and they would either accept his contracts, when and if we made one, or would refuse them in their own right. I at that time advised Mr. Finley possibly if he were operating in the areas of Burbank or in Oakland, that there would be an availability of orchestras in that area for a similar operation.

I think that, in sum and substance, is about the entire conversation I had with Mr. Finley at that time. [1030]

Q. Well, did it all happen in the sequence you have given it here?

A. It might not have been in the exact sequence in which I have given the discussion here, but that is my recollection right now of the conversation with him.

Q. Well, let me ask you this: Was there some kind of salutation?

A. Well, Mr. Finley had a big smile on his face, I recall, when I walked into his office, and at that particular time I am safe and sure in saying this, that the first discussion was one pertaining to the possibility of M. C. A. serving the Mission Beach Ballroom with orchestras. That was the first element of discussion.

Q. Did he at that time, when you walked in, say he was angry with you and told you, or, he said that he thought that you had hit a new low in lowness by coming

(Testimony of Harold Eames Bishop)

down to appear before the City Council in San Diego in Dailard's behalf?

A. There was no discussion along that line whatsoever.

Q. Did he also say to you, he says angrily, that it was a rotten thing for you to call Ralph Wonders of General Amusement and ask Ralph Wonders to come down and appear with you?

A. He said nothing in that regard.

Q. Did you talk about Ralph Wonders appearing there with you? [1031]

A. There was no conversation at that time relative to Ralph Wonders coming down with me.

Q. Did he say anything at that time, in substance or effect, that the lowest thing of all was calling Jack Flynn on the telephone about a week previous to that time, that is, the time of the conversation, and telling Jack Flynn that Dailard had been awarded the lease at Mission Beach, and that Flynn should write a letter to Dailard refuting his list of the bands? Was there anything like that?

A. There was no such conversation.

Q. Did you talk about Flynn down there at all?

A. No, there was no discussion about Flynn.

Q. Did Mr. Finley on that occasion say to you that he wanted nothing to do with you, and he would rather run recorded music in the ballroom than to buy bands from you, or from M. C. A.?

A. There was no such statement made.

Q. And that he would not deal with you personally at all?

A. There was no such statement made.

(Testimony of Harold Eames Bishop)

Q. Was there a discussion on that occasion of any opening date or playing dates that Mr. Finley had or suggested?

A. To my definite knowledge, there was no discussion in that regard. That is, I do not recall at this time that Mr. Finley made the statement that he had received the contract [1032] or not, but I know there was no discussion as to a policy or an opening date.

Q. Did you talk about the Trianon operation at all?

A. Mr. Howard—well, I don't know. There was no conversation when I came in relative to the Trianon.

Q. That is, relative—

A. To the booking in the Trianon.

Q. Did you talk about the place at all, or anything like that?

A. I might have passed some comment about the Trianon Ballroom. I don't recall. It was a side conversation.

Q. Well, was the attitude there of Mr. Finley toward you, let me put it, and you toward Mr. Finley one of anger?

A. There didn't appear to be any angeriness on Mr. Finley's part.

Q. And on your part?

A. And there was no animosity on my part toward Mr. Finley at that time.

Q. Nor now? A. Nor now.

Q. Mr. Bishop, when did you next see Mr. Finley, that is, to talk to him?

A. The next time that I saw Mr. Finley was in mid-May, and had to do with the actual signing of the Tommy Dorsey contract for appearance at the Mission Beach Ballroom in [1033] San Diego.

(Testimony of Harold Eames Bishop)

Q. Did you have any conversation with him over the telephone prior to that time?

A. One conversation, at which I called him at the Beverly Wilshire Hotel, I believe he was staying there at that time, and he asked that I bring the contract to his suite at the hotel, which I did.

Q. Was that the time it was signed?

A. No. Mr. Finley, even though I brought the contract over within fifteen to twenty minutes from the time of our conversation, was not in his suite, and I left a message at that time that I would be at my office and he could come by to sign the contract when it was convenient.

Q. And he did come to your office?

A. He came to my office.

Q. And you talked to him?

A. I talked with him, yes.

Q. And he talked with you? A. Yes.

Q. Did he raise any question there of animosity or not dealing with you, or anything of that kind?

A. There appeared to be no question of any animosity at all.

Q. By the way, I don't believe I have asked you this. I don't believe that I did. Did you talk to Mr. Barnet about [1034] calling up Ralph Wonders, I believe it was, and Mr. Flynn, or whoever it was you talked with in these two conversations?

A. I had no conversation with Barnet relative to that, no.

Q. Either before you called or after?

A. Either before or after the time I called, relative to the calls to Wonders and General Amusement.

(Testimony of Harold Eames Bishop)

Q. The calls you made there were independently, on your own part; is that right? A. That is correct.

Q. Did you have any conversation—I don't know whether I asked you this: Did you have any conversation with Mr. Barnet about going down at the time that the council meeting was to be held to consider the bids?

A. I don't recall any conversation relative to going down, with Barnet.

Q. That is, you don't recall talking to him about going down? A. That is correct.

Q. Hal Howard, I believe, went down with you?

A. Mr. Howard flew down, yes. He is a pilot.

Q. Was there any joint discussion with Mr. Howard and Mr. Barnet, in which you took part, about your going down to San Diego on that particular occasion?

A. There was no joint discussion. The decision to go [1035] to San Diego was strictly my own decision.

Q. Now, have you ever seen or talked to Mr. Finley since the occasion in May when the Tommy Dorsey contract was signed?

A. I saw Mr. Finley two times since that time, that I can recall, and I have possibly seen him more. I believe the first time was some time in July, at the time of a call I made down at the Casino Gardens, and he was at the Casino Gardens.

Q. Will you relate what occurred on that occasion?

A. Well, I bumped into Mr. Finley immediately after I got in the entrance, and he came up with a big smile, and we shook hands, and we talked for a few minutes about minor matters of which I have no recollection, and I told him following that that I was going down to Foreman Phillips Country Barn Dance, to see just what the

(Testimony of Harold Eames Bishop)

conditions were over there, and how well the Barn Dance was doing. He said, "I am very much interested. I would like to go down there with you." So Mr. Finley and I walked outside and got on one of the little cars to the beach and went to the Foreman Phillips Barn Dance and took a look at it.

Q. And what is Foreman Phillips—

A. That is a barn dance on the Venice Pier which caters to western bands, western dance fans. Foreman Phillips is the promoter, and the dance has assumed the name Foreman Phillips Country Barn Dance. They cater to fans that like [1036] that type of dance music, and it runs every Friday, Saturday and Sunday.

Q. Is that like the Bob Wills type?

A. It is a similar presentation to Bob Wills, that is correct.

Q. The people that play at those barn dances, are they name bands?

A. Yes, definitely, Bob Wills is a name band, and many of the bands Foreman Phillips has presented are name bands.

Q. Are there any other name bands of that type?

A. Yes, you have Roy Akoff. That is a name band that has a considerable reputation and recognition. Then there is the Ted Daffin and Happy Perryman. There are many others. Texas Jim Lewis. Oh, I could probably name ten to fifteen of them that appear in this area.

Q. Now, on the occasion of your riding down to the Foreman Phillips place on this tram car, when you were together with Mr. Finley, did he talk to you again about this low, rotten trick that you had done in talking to

(Testimony of Harold Eames Bishop)

Flynn or attempting to work in Dailard's behalf, as he said?

A. Well, actually, as a matter of fact, in our conversation there Mr. Finley, as he has been in every meeting I have had with him, was very, very friendly. He said he would like to do business with me and that he wished I was handling his account at the Casino Gardens, and that he liked the way [1037] in which I did business. And he at that time advised me that things were going along quite well at the Mission Beach operation. He discussed with me the Casino Gardens operation, and how things were going along well there. He made no special demand on me for orchestras at Misison Beach, nor were any names suggested for Mission Beach at that time in that conversation.

Q. Did he ask you if you had any bands for Mission Beach? A. He made no such statement or request.

Q. Did he tell you that he wanted to get some bands from M. C. A. for Mission Beach?

A. There was no statement along that line, no.

Q. At the time you saw him in May, when you signed this contract for Tommy Dorsey, that was to play at Mission Beach? A. That is correct.

Q. Did he say anything at that time about wanting any other bands for Mission Beach?

A. He made no requests for music at Mission Beach at that time.

Q. Has he at any time ever requested of you submission to him of any bands for playing at Mission Beach?

A. Only that contained in the original conversation that I had with him at the time of the meeting at the

(Testimony of Harold Eames Bishop)

Trianon [1038] Ballroom or Radcliffe at San Diego, following the City Council meeting.

Q. The one you have related here just a few minutes ago?

A. That is correct.

The Court: I believe we will just suspend now for a few minutes. Ladies and gentlemen, we will take our recess. Remember the admonition.

(A short recess was taken.)

The Court: All present. Proceed.

Q. By Mr. Warne: Mr. Bishop, you are familiar with the contract in evidence here, Defendants' Exhibit F, being the Wayne Dailard-Music Corporation of America contract entered into in May of 1944?

A. Yes, I am familiar with it.

Q. That contract was entered into about the date it bears?

A. Approximately the date it bears. The original contract was received from Mr. Dailard I think several days before this contract was arrived at.

Q. Did you have any conversation with Mr. Barnet, or with any other person of M. C. A., about this form of contract, when it came in from Mr. Dailard?

A. When this contract came in from Mr. Dailard, I turned it over to Mr. Barnet, and I believe that in the original form in which it was presented to us by Mr. Dailard there was some [1039] change. I am not acquainted with that. I believe there was, and subsequently this form was arrived at, and was negotiated.

Q. And was executed?

A. And was executed by the parties to the agreement.

(Testimony of Harold Eames Bishop)

Q. Was there any conversation had at that time by you with Mr. Stein about the terms of this contract?

A. Not prior to the time that this contract was originally brought in from Dailard.

Q. Was there any discussion at any time about any contract with Mr. Stein or Mr. Barnet, or with any one else of M. C. A., about having a contract which would give the exclusive booking at Pacific Square and Mission Beach to Dailard from Music Corporation of America?

A. There was never any discussion relative to an exclusive booking. The discussion was pertaining to this contract of first refusal.

Q. Was there any discussion at that time about the fact that this contract of May, 1944, Defendants' Exhibit F, superseded the letter form of agreement of November 4, 1941?

A. To my knowledge, it was mentioned that this contract was, in sum and substance, practically the same contract that was in existence as of the date in November of 1941. It was just worded differently, but the information and clauses meant the same thing.

Q. Of course, you are familiar with the November 4, 1941, [1040] contract? A. I am, yes, sir.

Q. Do you call that your signature that is below Carl Kramer on there?

A. That purports to be my signature, yes.

Q. As I understood your testimony this morning, these two contracts are the only contracts of which you have any knowledge, existing between M. C. A. and Mr. Dailard? A. That is correct.

Q. Do you know of any other agreement that has existed at any time from 1941 to 1944, and down to this

(Testimony of Harold Eames Bishop)

day, or at least down to January 1st or February 3rd, let's put it, 1945, between Music Corporation of America and Mr. Dailard, other than these two written agreements?

A. There is no other agreement, to my knowledge.

Q. What do you mean, to your knowledge?

A. I know of no other agreement.

Q. Did you ever have any other agreement with Mr. Dailard?

A. I had no other agreement, other than those two which are in evidence.

Q. Did you ever have any other understanding of any kind, other than these formal agreements, with Mr. Dailard of any kind?

A. There was never any understanding other than those contained in those agreements. [1041]

Q. Now, you know that Mr. Stutz, in the new management, took over July 1, 1945? A. Yes.

Q. You have had contacts with Mr. Stutz with reference to booking orchestras? A. That is correct.

Q. Has there been any contract or agreement of any kind executed between Mr. Stutz and Music Corporation of America, to your knowledge?

A. There is no agreement between Music Corporation of America and Mr. Stutz.

Q. Is there any understanding of any kind, let us say, that you have entered into with Mr. Stutz?

A. There is no other understanding other than of business relationship on each individual attraction, as they are submitted.

(Testimony of Harold Eames Bishop)

Q. That is, on each proposal to book a band into Pacific Square; is that correct?

A. That is correct.

Q. Was there ever any discussion about assigning this Dailard-M. C. A. contract?

A. Yes, there was discussion.

Q. And Mr. Stutz was a party to that?

A. Mr. Stutz, at the time the sale was discussed,—

Q. I am just asking you if he was a party to that. [1042] A. Yes.

Q. And was Mr. Dailard a party?

A. Mr. Dailard was a party.

Q. Did Mr. Dailard ask you to assign it?

A. Mr. Dailard asked if we would assign the contract that he had for Music Corporation of America bands.

Q. To the new owner? A. To the new owner.

Q. And did you reply to him?

A. I replied that there would be no assignment of the contract.

Q. And there was no assignment of the contract?

A. There was no assignment of the contract.

Q. You have continued to book bands for Mr. Stutz on request? A. That is correct.

Q. You have booked the whole of the bands in there?

A. I booked practically all of the bands into Pacific Square.

Q. Are they all M. C. A. bands?

A. All of the bands since Mr. Stutz took over, I think with one exception, are M. C. A. bands, that have played there so far.

(Testimony of Harold Eames Bishop)

Q. Have you had any telephone conversation with Mr. Dailard—I will put it this way: I believe Mr. Dailard [1043] referred to a telephone conversation he had with you with reference to some girl band. Do you remember about that? A. Mr. Dailard?

Q. No, Mr. Finley.

A. Yes. I think I recall from his testimony something about a Joy Caylor orchestra.

Q. Joy Caylor. Do you know that orchestra?

A. I know that orchestra.

Q. What conversation, or, what occurred between you and Mr. Finley with reference to that?

A. I put in a call to Mr. Finley. I don't know where our switchboard operator reached him. I think it was some time in September or October of 1945. He came on the other end of the telephone, and I discussed the availability of Joy Caylor's orchestra, all-girl orchestra, of considerable ability and reputation for the Trianon Ballroom in San Diego. He at that time advised me that there was no opening at the Trianon and consequently turned down the submission of the Joy Caylor orchestra.

Q. Was there anything said in that discussion about booking any bands into Mission Beach?

A. There was nothing in that discussion relative to Mission Beach booking.

Q. Did he ask you anything about Mission Beach at that time? [1044]

A. To my knowledge there was no discussion relative to Mission Beach.

(Testimony of Harold Eames Bishop)

Q. Did he say to you, "When are you going to give me some of your top name bands, like Harry James and Krupa?"

A. There was no discussion in that regard.

Q. And did you reply, "You are not going to get these kinds of bands"?

A. There was no discussion in that regard.

Q. Have you ever had any discussion regarding booking bands at Mission Beach with Mr. Finley since that time in the Trianon Ballroom?

A. No, there have been no discussions relative to that, that I can recall.

Q. There has been some mention here of the King Sisters. Do you know who the King Sisters are?

A. Yes.

Q. That is a singing aggregation, three girls?

A. That is a singing aggregation.

Q. Do you recall whether that aggregation ever played Pacific Square prior to 1945? [1045]

A. Yes; the King Sisters originally were a part of the Alvino Rey orchestra, and Alvino Rey orchestra had been previously booked into Pacific Square, I think either one or two times. The King Sisters appeared at Pacific Square as a member of that organization or as a part of that organization of Alvino Rey orchestra.

Q. Do you know that the King Sisters played Pacific Square or showed at Pacific Square a date in February, 1945?

A. Yes; I know that they did in February.

Q. And who arranged that booking?

A. I arranged the booking.

(Testimony of Harold Eames Bishop)

Q. I show you a document called an "inter-office communication" dated January 11, 1945, which I have shown to counsel. Did you ever see that before?

A. Yes; I saw this communication before.

Q. Do you recognize the writing in pen at the bottom of the document?

A. Yes, I do.

Q. What are those letters?

A. That is the initials of Mr. Ken—Kenneth Later who was an employee of our office.

Q. Just what are they?

A. It is K-e-n, Ken.

Q. When did you first see this document?

A. Shortly after January the 11th. I would say possibly [1046] the 12th or 13th I did see that document.

Q. From whom did you get it?

A. Mr. Barnet.

Q. Did you have any conversation with Mr. Barnet at that time?

A. Mr. Barnet put the document on my desk and he said that the King Sisters were available for a booking at Pacific Square. I told him that I would submit the King Sisters and advise back as to the booking of the group.

Q. And did you do that?

A. I submitted the King Sisters to Mr. Wayne Dailard. He confirmed the King Sisters, and the booking was a confirmed booking, I advised, through the usual office channels.

Mr. Warne: I will offer, if the court please, the document identified by the witness, as the defendants' next in order.

The Court: So ordered.

The Clerk: Defendants' Exhibit M.

(Testimony of Harold Eames Bishop)

(The document referred to was marked as Defendants' Exhibit M, and was received in evidence.)

Mr. Warne: I would like to read the subject matter of this at this time, if the court please.

The Court: Very well.

Mr. Warne: This is on the letterhead or form of the Music Corporation of America, labeled "Inter-Office Communica- [1047] tion." That is printed.

"Date: January 11, 1945. From Kenneth Later at B. H."

Q. What does "B. H." stand for, if I may interpolate? A. Where is it? If I could see it?

Q. "B. H."? A. The initials "B. H."?

Q. Yes. A. Beverly Hills Office.

Mr. Warne: Thank you. Reading again:

"To Larry Barnet at B. H.

"Subject: King Sisters

"I have the King Sisters available for the Pacific Square in San Diego, salary \$1500. Please advise what date I can confirm this booking.

"(Signed) Ken"

Signed "Ken" at the bottom in ink, K-e-n.

Q. Had you had any conversation with Mr. Wayne Dailard about the King Sisters prior to this January 11th date?

A. There was conversation with Mr. Dailard relative to the King Sisters. They had achieved considerable notoriety through records and were quite desirable as an act, and he advised me—I don't know the exact time, but it was in 1944—that if and when they were available for

(Testimony of Harold Eames Bishop)

booking at Pacific Square, he would entertain the submission. [1048]

Q. Did you discuss that with Mr. Barnet prior to January 11th? A. About the King Sisters?

Q. Yes.

A. I do not recall whether I had discussed it with Mr. Barnet or not.

Mr. Warne: You may cross-examine.

Cross Examination

By Mr. Christensen :

Q. You know a man by the name of Morry Landau, don't you? A. Yes, I do.

Q. You know about that matter up in Ventura, don't you? A. What matter are you referring to?

Q. You know that he was engaged in a ballroom operation up there, don't you?

A. Mr. Landau? I know that Mr. Landau presented one-night attractions in Ventura.

Q. Oh, while I think about it: How did you happen to submit this Exhibit M to Mr. Barnet?

A. Did I present that to Mr. Barnet? I did not present that to Mr. Barnet. He presented it to me.

Q. Was that after Mr. Later and Mr. Barnet had talked with Mr. Finley about the King Sisters?

A. I do not recall their conversation. [1049]

Q. But, in any event, Mr. Barnet told you to call Dailard and confirm this booking?

A. Mr. Barnet presented this availability on my desk and I consummated the booking.

Q. He did not tell you that he had already agreed, both he and Mr. Later had agreed, that Mr. Finley could

(Testimony of Harold Eames Bishop)

have the King Sisters for booking at Mission Beach, did he?

A. There was no statement in that regard, no.

Q. He made no such statement to you?

A. He made no such statement.

Q. He just said, "Here, book this into Pacific Square?"

A. He said, "Here is an availability for Pacific Square."

Q. And you got on the telephone right away and called Dailard? A. That is correct.

Q. You know that Mr. Dailard is still advising and participating in the booking of M. C. A. bands for Stutz at Pacific Square, don't you?

A. I have no such knowledge.

Q. Have you submitted to Mr. Dailard any orchestras for his employment since the sale of Pacific Square to Mr. Stutz?

A. I submitted no orchestras direct to Mr. Dailard. Shortly after—I can explain, I think, the point that you—

Q. No. You can just answer my question. [1050]

Mr. Warne: Just a minute, I submit that is a fair answer to the question.

The Court: He was answering the question and then he diverted to explain. He did not finish the answer to the question he was asked.

The Witness: Would you repeat the question, please?
(Question read by the reporter.)

A. No.

(Testimony of Harold Eames Bishop)

Q. By Mr. Christensen: I want to show you your deposition, at page 106, lines 22 to 26, inclusive. Will you look at it, sir? Have you read it now?

A. I have read it.

Q. I ask you if upon the occasion of the taking of your deposition, Mr. Bishop, if you were not asked this question?

“Have you submitted to Mr. Dailard any orchestras for his employment since the sale of Pacific Square by him to Mr. Stutz?”

And if you did not give this answer:

“Bands have been discussed with Mr. Dailard. He is advising Mr. Stutz on his band problems.”

Did you give such an answer?

A. Such an answer was given.

Q. That is your answer?

A. That is the answer, but could I qualify?

The Court: You can qualify the answer, yes. [1051]

A. The question which he asked me meant was Mr. Dailard the employer, if the court reporter would read that. Did I submit them to Mr. Dailard for his employment? That is not so. I did not submit any bands for Mr. Dailard's employment. I submitted bands to Mr. Dailard. Mr. Stutz advised me that for a month or two Mr. Dailard would help him in the submission of the bands, and for possibly two or three weeks thereafter I submitted bands to Mr. Dailard.

Mr. Warne: If the court please, I do not believe it was established in the question that was asked that this deposition was taken on August 6th, 1945. I think that is a fact.

Mr. Christensen: August the 9th.

(Testimony of Harold Eames Bishop)

Mr. Warne: August the 9th. I stand corrected.

Q. By Mr. Christensen: Before going to San Diego to appear there before the council did you discuss this matter at all with Mr. Barnet, the fact of your trip?

A. No.

Q. It is your custom and practice, is it not, to discuss with Mr. Barnet any field trips you are making?

A. Not necessarily.

Q. However, you generally do, do you not?

A. There is no rule as to that regard. I might discuss it or I might not discuss it with him.

Q. Well, don't you generally do it? [1052]

A. I would not say generally.

Q. I will ask you if on the occasion of your deposition you were not asked that same question. First of all, will you look at page 45? Have you read it now?

A. Yes.

Q. On that occasion were you not asked this question: "But you generally do?"

A. Yes.

Q. You answered: "Generally do." That is correct, is it not?

A. That is correct.

Q. Now, do you want to explain the difference in your answers?

A. Well, I mean by my answer, and the facts of the case are, that there is no rule, generally speaking, to consult with Mr. Barnet, who is my superior, as to any field trips that I may deem necessary in the execution of my responsibilities. There is no general or standard practice in that regard. If, in my opinion, I decide a case that my presence is needed, I can go without discussing that with him. If I feel I need the benefit of his advice as to the matters which I may present or as to discussions

(Testimony of Harold Eames Bishop)

there, I may discuss it with him. But generally, there is no general rule. I may or I may not. But, as a general practice, you [1053] can't say—it is not right that I do discuss it with him.

Q. Then, this answer is not true?

A. It is not strictly true.

Q. Now, you say that while you were at the Council, someone stood up and said that the representative from Music Corporation of America was there. That person could not happen to be Ed Wakelin, could it?

A. It may have been Mr. Wakelin. If my memory serves me correct, he was sitting with another gentleman who I hadn't seen before. I don't know who made that remark. I don't recall.

Q. You think it was Mr. Wakelin, though, don't you?

A. I do not recall.

Q. I ask you upon the occasion of the taking of your deposition if you were not asked that question and gave the answer: "I think Mr. Wakelin said that."?

A. It might have been Mr. Wakelin; I do not recall.

Q. Tell me whether you said that in your deposition? Mr. Warne: Please let him see it, if the court please.

Q. By Mr. Christensen: Then, your answer there was not true?

A. I think so. It may not be complete. It was one or the other of the two gentlemen.

Q. Your answer here, then, was not true?

A. I could not say that it was or that it was not. I [1054] don't know what it was. It was one of the two gentlemen.

(Testimony of Harold Eames Bishop)

Q. You recall talking to Mr. Ralph Wonders at or about that time, don't you, sir?

A. At or about the time of the meeting in San Diego?

Q. Yes; either, I think, it was the week prior to that time. Don't you?

A. I recall the conversation with Mr. Wonders approximately at that time.

Q. And at that time did you tell Mr. Wonders that Mr. Dailard had obtained a renewal of his contract at Mission Beach?

A. I made no such statement.

Q. Did you say to him, did you at that time tell him that Mr. Dailard had assured you that he was going to secure the contract?

A. I believe I might have made remarks in that regard. I did state that.

Q. As a matter of fact, that conversation with Mr. Wonders took place about a week before the bids were opened; that is true, isn't it?

A. I do not recall exactly when. It was prior to my trip to San Diego.

Q. And you made your trip to San Diego the date that bids were to be opened?

A. That is correct. I made my trip to San Diego on [1055] November the 8th, the date the City Council meeting was. I don't know when the bids were opened, whether they were opened then or opened earlier and they were to be considered on November 8th. But the date the City Council met, as it has been discussed here, was the date that I went to San Diego.

Q. Did you discuss your telephone call to Ralph Wonders with Mr. Barnet?

A. I did not discuss it with Mr. Barnet?

(Testimony of Harold Eames Bishop)

Q. Didn't tell him a thing about it?

A. Told him nothing about it.

Q. Did you discuss your telephone call to Mr. Flynn with Mr. Barnet?

A. I did not discuss it with Mr. Barnet.

Q. You kept still about that?

A. That is correct.

Q. What is the name of the other man you telephoned to, one of the booking agents?

A. I don't recall telephoning any of the other booking agencies. I talked with other agents, the Frederick Bros.

Q. Who did you talk with there?

A. Well, I don't believe I talked with them prior to this other than on actual bookings. I don't believe I talked with them relative to the situation between Pacific Square and Mission Beach. [1056]

Q. At any event, you called both Mr. Flynn and Mr. Wonders and told them that Dailard was going to get the bid?

A. I told them that I was advised by Mr. Dailard that he was going to be successful in securing the bid; yes.

Q. And that they should withdraw their letters that they had given—

A. I made no such statement.

Q. —and later told them they had better write letters to Mr. Dailard?

A. I made no such statement so far as writing letters to Mr. Dailard. I learned that the possibility was that they had written letters. The nature of my call to them was to ascertain if they had written those letters and the contents of those letters, and to advise them that I understood that Mr. Dailard was going to be able to continue his operation of Mission Beach.

(Testimony of Harold Eames Bishop)

Q. Now, what was your purpose in making those calls, Mr. Bishop.

A. In servicing Mission Beach with orchestras, we needed the attractions of Pacific Square—rather, needed the attractions that the other agencies had, in order to operate. We had a vast amount of customers that were asking for orchestras. If one of the competitive agencies had an orchestra which could play at Pacific Square, then the orchestra, if we did have an orchestra that would be [1057] scheduled for there, we could arrange for other customers and have other demands elsewhere.

Q. It was not to help Mr. Dailard, then?

A. It was to help Mr. Dailard; yes.

Q. And to see to it, if possible, that he got the bid on Mission Beach—he got the lease on Mission Beach?

A. So far as to see that he got the bid on Mission Beach, it was to understand what their position was going to be relative to whether or not Mr. Dailard would be able to operate Mission Beach or not, or whether or not Mr. Finley would be able to operate Mission Beach; just what their intentions were.

Q. You knew what their intentions were, didn't you?

A. I was advised that they would do business with both parties, whichever one bid the highest price for the bands.

Q. You knew that before you telephoned, didn't you?

A. I wasn't sure of that. To my knowledge, I felt that they were satisfied with the presentation of their attractions in San Diego. I know that the majority of the attractions which they had submitted were played at Pacific Square in San Diego, and I thought that they

(Testimony of Harold Eames Bishop)

were pleased with it, other than the fact that they split commissions with me for their bands which we arranged.

Q. They always had to split commissions with M. C. A. in order to play in Pacific Square, didn't they? [1058]

A. That is wrong. In some instances they split commissions; in some instances they did not split commissions.

Q. Tell me when they did not split commissions?

A. They did not split commissions when Pacific Square needed that orchestra and we had no other orchestra to put in of equal caliber.

Q. In other words, if you were right up against it, then you would not require them to split their commission with you; is that the statement?

A. One qualification I would put on it. In the instance of such a band as Tommy Dorsey, which is a band of great credit to wherever he may play. In the conversation with Mr. Wonders relative to the booking of Tommy Dorsey I asked for a commission. He said, "Ames, on a band like this we are not going to give you any commission." I said, "O.K."

Q. You did your best to get it, though, didn't you?

A. I always did my best to get a commission from him, yes.

Q. In other words, if there was going to be any booking in Pacific Square, you wanted to get for M. C. A. a commission on that, didn't you?

A. For every booking in Pacific Square I wanted to get a commission if possible.

Q. Or else they don't play in Pacific Square?

A. That is not so. The record speaks for itself. The [1059] bands played in Pacific Square without paying M. C. A. a commission.

(Testimony of Harold Eames Bishop)

Q. That is when you couldn't help yourself, isn't it?

A. When they refused to pay me the commision; that is right.

Q. Let us go back to these letters. You knew the contents of those letters before you telephoned both Flynn and Wonders, didn't you?

A. I did not know the contents of the letters.

Q. You had been advised of their contents, hadn't you?

A. I had not been advised. I had been only generally advised of the fact that there was a possibility that they had sent letters. At the time of the conversation, I even had no distinct assurance that the letters had been sent.

Q. Who told you the letters had been sent?

A. I think it was just a conversation I heard. Whether or not it was Mr. Thayer that told me that—

Q. When did you hear it?

A. When did I hear it?

Q. Yes.

A. Prior to the time that I went to San Diego.

Q. Did you say Thayer was talking about it?

A. No; I didn't make any such statement that Mr. Thayer was talking about it.

Q. Well, I misunderstood you, then. I understood you [1060] to say that you overheard a conversation that Mr. Thayer had concerning it. Is that true or not true?

A. I don't recall any conversation in that regard.

Q. Well, did you hear Mr. Thayer speak of the fact?

A. No. I don't recall ever hearing Mr. Thayer speak of it.

Mr. Christensen: Mr. Reporter, would you go back there to the answer concerning Thayer and read it to me?

(Testimony of Harold Eames Bishop)

Mr. Warne: That assumes that there was an answer concerning Thayer. I did not so hear it.

The Court: Yes; let the reporter read the record.

Mr. Christensen: I may be entirely in error, Mr. Warne, I don't know, but I would like to have it read.

(Record read by the reporter.)

Q. You don't know, then, whether it was Mr. Thayer or not?

A. In speaking of the name Thayer, it should be "Dailard". I don't know how Thayer came in the conversation there.

Q. Mr. Thayer is the vice president of the Music Corporation?

A. Mr. Thayer is not the vice president of the Music Corporation.

Q. What is his position there?

A. Mr. Thayer is a salesman with Music Corporation of [1061] America.

Q. Did you tell Mr. Wonders when you talked to him on the phone that you wanted him to bring a list of your bands, meaning M. C. A. bands, down and present the list to the City Council?

The Witness: Will you repeat the question, please?

Mr. Christensen: Will you read it, Mr. Reporter?

(Question partially read by the reporter.)

Mr. Christensen: I want to correct that; I want to correct that.

Q. Meaning G. A. C. bands?

The Court: Now, re-frame your question.

Mr. Christensen: Yes. I withdraw the question that is pending.

(Testimony of Harold Eames Bishop)

Q. Did you tell Mr. Wonders that you wanted him to bring a list of G. A. C. bands down and present that list to the Council? A. No.

Q. The City Council? Pardon? A. No.

Q. Do you recall having a luncheon at which Mr. Dailard and Mr. Wonders were present?

A. No; I do not recall a luncheon.

Q. I believe it was at the Players' place?

A. No. [1062]

Q. You do not recall that at all?

A. I would say that there was no luncheon at which I was present.

Q. Let us go back. You have handled exclusively the bookings had at Pacific Square during the year 1945, haven't you?

A. On a first refusal basis for Music Corporation of America attractions, I have handled Pacific Square.

Q. Has there been any band which you submitted to either Mr. Dailard or Mr. Stutz that has been turned down by either of them?

A. To my knowledge they have turned down no submissions that have been made to them.

Q. And you have furnished all the bands that were played there in the year 1945, with five exceptions, is that true?

A. My memory would not allow me to say that correctly. I have records in that regard.

Q. Well, let me refresh your memory. With the exception of Artie Shaw, George Ault, Stan Kenton, and

(Testimony of Harold Eames Bishop)

Vaughn Monroe, you have booked every band that played in Pacific Square during the year 1945, haven't you?

A. On the weekends. There was other times that orchestras were used at Pacific Square during week-days which I have no knowledge of. During the weekends, I believe that is [1063] correct. To make an exact statement that is correct I would have to look over my records.

Q. Let us get away from the weekends. Tuesday is not a weekend, is it?

A. Tuesday is not a weekend; no.

Q. Tell me, you put bands into Pacific Square every Tuesday, didn't you?

A. Not every Tuesday. I booked occasional Tuesdays, Texas, Western bands in the Pacific Square.

Q. As a matter of fact, you booked Bob Wills, one of your bands, in there for every Tuesday, didn't you?

A. That is not correct.

Q. Tell me what Tuesday during the first part, let us say, January 1st to July 1st of 1945, that Bob Wills did not play there?

A. I can consult my records and give you that information. During the first part of January there was no Tuesdays that Mr. Bob Wills played at Pacific Square.

Q. What day of the week was it?

A. I don't believe that he played any other day. He started the latter part of January at Pacific Square, and I think he played fairly consistently during the early part of the year, and, if my memory serves me correctly, during the latter part of the year of 1945 Mr. Wills only appeared intermittently, possibly once every four weeks. But there was [1064] no definite schedule of every Tuesday re-occurrence of Bob Wills orchestra.

(Testimony of Harold Eames Bishop)

Q. Well, let us put it in another way. Bob Wills had been playing at the Mission Beach during the year 1944, hadn't he? A. Yes.

Q. And you felt him to be quite an attraction in the San Diego area, didn't you?

A. He was quite an attraction; yes.

Q. So I think you are perfectly right that he did not play in the month of January. But beginning February, you did book him into the Pacific Square for a period of a number of months, didn't you?

A. I think the records can verify that. I know that he played fairly consistently from the last Tuesday in January, which, if my memory serves me correctly, was January the 30th.

Q. Just a couple of days before Finley opened up?

A. Actually, that is the way I imagine it worked out. He opened in February.

Q. Did you book any local band into Pacific Square during the year 1945, sir?

A. Local San Diego band?

Q. Yes, or local Los Angeles, San Diego or Los Angeles County band, either one?

A. When Bob Wills was not available during the time [1945] that they had Western dances on Tuesday nights, I secured a couple of other Western bands. I believe Happy Perryman was one orchestra; I believe Hank Perry was another orchestra. I don't recall whether Texas Jim Lewis was another orchestra that played during January there on a Tuesday night, but I believe that he was. Our records can verify that.

(Testimony of Harold Eames Bishop)

Q. Well, did you get any other bands that you can now recall for Pacific Square for the year 1945?

A. Other than those that we have discussed?

Q. That is right. A. On other nights?

Q. I am talking about your local bands, not your name bands, sir.

A. I would have to consult my records to be sure about local name bands having played there.

Q. Now, what compensation did you receive from Dailard for performing these services for him?

A. For booking the Pacific Square account during my relation with Mr. Dailard?

Q. Yes.

A. I received no compensation whatsoever.

Q. What did you receive for booking these local bands in there?

A. I received no compensation from Mr. Dailard other than the commission which is prescribed by the Musicians'[1066] Union as a commission suitable to be taken by an agency.

Q. But he gave you gifts from time to time, didn't he?

A. Mr. Dailard gave me one Christmas present during the four years of my handling his account, a package of fruit which arrived once each month, a Fruit of the Month present.

Q. Did he give you some money at the time you were building your house?

A. Mr. Dailard has never given me any money. He has not given me any present of any sort, of any value whatsoever, other than the Fruit of the Month.

(Testimony of Harold Eames Bishop)

Q. Directly or indirectly?

A. Directly or indirectly or any other way.

Q. Now, you had available there for every weekend at the Pacific Square during the year 1945, with the five exceptions, your name bands, didn't you?

A. Yes; I would say that.

Q. Let me ask you, is it not true that a name band is a band that is recognized by the general public as a band set up in the business of music-making?

A. I would say that that is a fair statement, yes.

Q. In other words, to state it in a couple of words, a name band is a band that has made a name for itself throughout this country?

A. I wouldn't say that. A name band is a band that has [1067] made a name for itself in a community or in an area, either county-wide, city-wide, state-wide, or international.

Q. Then it would not be the general public, would it?

A. Well, general public are here in Los Angeles. They are general public.

Q. Oh, I see.

The Court: Nothing further, gentlemen?

Mr. Christensen: Yes, I have. Yes, sir; I have a lot of questions, your Honor.

Q. You recall the booking there of Tommy Dorsey into the Mission Beach ballroom, don't you?

A. Yes.

Q. You know about that, don't you?

A. Yes.

(Testimony of Harold Eames Bishop)

Q. You first learned about it when Tommy Dorsey's manager, Mr. Michaud, called and told you to issue the contracts?

A. I don't recall whether that is the first knowledge that I had that the booking was being contemplated, no.

Q. What is your best memory as to your first knowledge of that matter, Mr. Bishop?

A. Well, I had heard discussions prior to the time that I was advised to issue the contracts that Tommy Dorsey was considering going to Mission Beach?

Q. And you talked to Mr. Michaud? [1068]

A. That is right.

Q. He at that time was in New York?

A. That is correct.

Q. And you requested him to not book the date at Mission Beach, didn't you? A. I did not.

Q. Did you tell him that he should not play down there?

A. I told Mr. Michaud that Pacific Square had presented Tommy Dorsey's orchestra many times in the past; that his orchestra had always enjoyed a very exceptionally fine business at Pacific Square. I told him that, in my opinion, my advice would be for him to continue appearing at Pacific Square for reasons: One, I thought his gross would be bigger; two, the Pacific Square was not a seasonal operation, and that there might be occasion when Mr. Dorsey would be available for booking in San Diego possibly in the wintertime when it was not advantageous and sound business to play at a beach resort; and I did not feel that he should incur the displeasure of Mr. Dailard by playing competition to him.

(Testimony of Harold Eames Bishop)

Q. And Mr. Michaud told you that Mr. Tommy Dorsey wanted to play there, though, at the Mission Beach ballroom?

A. Mr. Michaud at that conversation told me that he would discuss the matter with Tommy Dorsey and that he would advise me back.

Q. You asked Mr. Michaud if it would be all right with [1069] him, Mr. Michaud, for you to call Tommy Dorsey directly at the place he was playing then, which I believe was Boston; that is correct, isn't it?

A. I may or may not have made that statement. I don't know.

Q. And you did telephone to Tommy Dorsey in Boston, didn't you?

A. I did not telephone Tommy Dorsey.

Q. Well, you talked to him there?

A. I did not talk to Mr. Dorsey.

Q. Did you talk to Mr. Dorsey at all?

A. I did not talk to Mr. Dorsey personally relative to the appearance in San Diego.

Q. How many times did you talk to Mr. Michaud about it?

A. To my knowledge, I talked to Mr. Michaud only on this one conversation, and I don't recall exactly whether I was advised by wire or by telephone call or through another member of our organization to issue the contracts. That may possibly be another time that I talked to Mr. Michaud.

Q. Even though you had tried to discourage Mr. Michaud—Mr. Dorsey, through Mr. Michaud, from playing

(Testimony of Harold Eames Bishop)

Mission Beach ballroom, he said he wanted to play Mission Beach ballroom, didn't he?

A. The only information following the discussion which [1070] I have herewith stated to you was the information that the contract should be issued, and a statement of terms under which those contracts should be issued.

Q. In other words, you were advised by Tommy Dorsey of that fact? A. By Arthur Michaud. [1071]

Q. Now, that was a direct booking by Mr. Finley with Mr. Tommy Dorsey?

A. The booking—the mention of the price was direct. The booking was executed by Music Corporation of America, in fact we secured the signatures of the principal parties.

Q. You insisted on that, didn't you?

A. We insisted that the contract be on Music Corporation of America forms.

Q. At that time you wanted it on M. C. A. forms; is that right?

A. I don't—your implication there—we always insist on our bands that they be on M. C. A. forms.

Q. Did you ever hear of Paul Martin?

A. Yes, I have heard of that.

Q. You got your commission on the Dorsey booking?

A. Is that a question?

Q. Yes, sir. A. Yes.

Q. Now, are you familiar with the relative floor space, the dancing area, at Mission Beach and Pacific Square?

A. Not exactly. Generally, I am.

(Testimony of Harold Eames Bishop)

Q. How do they compare, sir?

A. I would say that Pacific Square has slightly larger floor area.

Q. Do you know what the floor area at the Mission Beach [1072] Ballroom is?

A. I do not know exactly, no.

Q. Do you know what the floor area at Pacific Square is? A. I do not know exactly, no.

Q. By the way, tell me when was Miss Katleman your secretary, Mr. Bishop?

A. Miss Katleman, I believe, was employed in mid-summer of the year 1941, if my memory is right.

Q. To when? A. To when?

Q. Yes, sir.

A. I think she served as my secretary for approximately a year and a half. I am not quite sure on that.

Q. She was your secretary at the time this contract was made, wasn't she?

A. The November, 1941, contract, she was my secretary, yes.

Q. That is the one where your signature appears on it?

A. That is the one my signature appears on.

Q. That is the contract you discussed with her?

A. I did not discuss that contract with Miss Katleman.

Q. That is the one you felt rather elated about putting through?

A. I did not feel elated about putting the contract through. There was no elation connected with that contract, [1073] because the contract was a renewal of an original letter which was sent. It was just a continuance of that. I cannot take any personal glory. I did not ask for it. Mr. Dailard asked that it be put in that form.

(Testimony of Harold Eames Bishop)

Q. You say that was a continuation?

A. I am led to understand, and I am advised that there was an original letter which was presented to Mr. Dailard at the time the Pacific Square was—the building of the Pacific Square was contemplated. The letter was a similar letter to that which, in my opinion, the William Morris Agency and the General Amusement Agency possibly, gave Mr. Finley, stating that we would be happy to serve Mr. Dailard at the Pacific Square Ballroom in the event the ballroom was built. I have not seen that letter, but when I took over the booking of Pacific Square, they had at that time a first refusal arrangement on orchestras, and the letter—the contract which is drawn up is one which Mr. Dailard asked be drawn up.

Q. Well, if there was no change in it, then do you know why it was drawn?

A. The letter—I didn't read the original letter, so I can't make a statement on that.

Q. Oh, I see. But, in any event, you put through that contract there of November, 1941, didn't you?

A. The contract, the letter was originally submitted to [1074] me. I turned the letter over to Mr. Barnet. Mr. Barnet drafted the letter in its present form, and the signatures were then secured to the letter contract.

Q. Now, since Mr. Stutz has had Pacific Square, you have continued in the same manner to give him first refusal, to use your words, of every M. C. A. band that you have?

A. We had no intention of first refusal.

Q. Just answer my question, please. A. No.

(Testimony of Harold Eames Bishop)

Q. Tell me, you have supplied him with all of your bands, haven't you?

A. Yes, all of the bands that we had available for booking for him.

Q. And every band that you learned about that would be available for playing in the San Diego area you submitted to Mr. Stutz, didn't you?

A. Yes, that I knew was available, I submitted to Mr. Stutz.

Q. And you got commission on bands you offered to Mr. Stutz, didn't you?

A. Bands other than our own?

Q. Yes.

A. In the one instance, Georgia Auld, yes.

Q. What other bands did you get from any other company for Mr. Stutz? [1075]

A. There have been no other bands from any other company for Mr. Stutz up to the present time.

Q. Then it is 100 per cent?

A. Well, we have testified that there is Georgie Auld.

Q. Well, that has not yet played?

A. Georgie Auld was played in August of 1945.

The Court: I think we will suspend now, ladies and gentlemen, until the morning; 10:00 o'clock tomorrow morning. Remember the admonition.

(Whereupon, at 4:30 o'clock p. m., Thursday, February 7, 1946, an adjournment was taken until 10:00 o'clock a. m., Friday, February 8, 1946.) [1076]

Los Angeles, California, Friday, February 8, 1946.
10 a. m.

The Court: All present. Proceed.

Mr. Christensen: Mr. Bishop, will you resume the stand?

HAROLD EAMES BISHOP,

called as a witness by and on behalf of the defendants,
having been previously duly sworn, resumed the stand and
testified further as follows:

Cross Examination (Continued)

By Mr. Christensen:

Q. Mr. Bishop, I had asked you concerning the conversation with Mr. Michaud concerning the Tommy Dorsey orchestra? A. Yes.

Q. In addition to what you have told us about your telephone call and your wires to Mr. Michaud, and vice versa, you talked to him again when he returned to California?

A. I have talked to Mr. Michaud, yes.

Q. And you again tried to persuade him not to play at the Mission Beach Ballroom?

A. I may have repeated the text of the discussion that I had with him at the time of the telephone conversation, advising him—I don't recall whether I saw Mr. Michaud before the contract was signed, or after the contract was signed, actually as to point of time.

Q. Now, what are the duties of a personal manager of a [1078] band?

A. To my knowledge, the duties of a personal manager of a band is to counsel the band leader in his relationship with the agent, and to render him more personal

(Testimony of Harold Eames Bishop)

service than the agency is able to render him. He is the go-between the land leader and the agent. He counsels further relative to advertising promotion, and other activities he may have other than in the band business.

Q. Well, the composition of a name band consists, then, in addition to the musicians and to the leader, and a personal manager, some other personnel, does it not, sir?

A. Well, not all name bands have personal managers. I think quite a few of them do.

Q. All right. What other personnel does a band normally carry?

A. You mean in traveling?

Q. Yes, sir.

A. Well, they carry their musicians. They have a band boy. The personal manager in the great name bands is a man that does not travel with the band itself. They would have a road manager who handles the details of the band in arranging—

Q. All right. Now, let's see. In addition to a band boy, personal manager, road manager, what other personnel is there? [1079]

A. I think that is about the limit of the usual personnel.

Q. They carry, in addition, in many bands certain attractions, do they not, sir?

A. You mean—well, that is a part of the band's presentation.

Q. I had deliberately used the word "musicians" as distinguished from singers and other performers.

A. Most name bands have vocalists which have a reputation in their own right, yes.

(Testimony of Harold Eames Bishop)

Q. Well, in addition to singers who have a reputation in their own right, they also have other players who have a reputation in their own right.

A. You mean individual musicians?

Q. That is correct. A. Yes.

Q. As a matter of fact, a band leader strives to make a band one which is composed of outstanding personnel, does he not?

A. Well, I think that there may be some discussion there. It depends upon the cost of those personnels. If the band leader is a great name band leader, he might be able to do a maximum amount of business without having any personnel in his band that would run his costs up.

Q. Within the limitations of the costs, he seeks to do [1080] that?

A. I believe he always tried to get the best individuals to associate with them that they could.

Q. To the end that they are even advertised separately?

A. Not necessarily separately. I think they are advertised in conjunction with the band leader.

Q. You are perfectly right. I didn't exactly phrase my question correctly. Now, the band boy, what are his duties?

A. The purpose of the band boy, in my understanding, would be to set the musicians' stands up on the engagements, see that the bags and baggage get to the railroad station, see that the band leader and the musicians have water and sandwiches, and things along that line, if necessary, on a job; and he is just a general flunky.

(Testimony of Harold Eames Bishop)

Q. In addition to the personnel you have named, bands carry arrangers, do they not?

A. Well, some do and some don't. Some arrangers may travel with the band, and be individually also, in addition to arranging, musicians in the band. I don't believe in your great name bands the usual rule is that the arranger travels with the band. [1081]

Q. You do believe?

A. I do not believe that they do.

Q. That is right. Arrangements, however, are carried with the band?

A. The arrangements are carried with the band.

Q. In the formation of a name band, generally the leader decides on what class of music that he will play; for example, it would be swing or the other names—I am not familiar with it—but different classifications of music; is that right, sir?

A. The leader would choose the styling of the music.

Q. The styling; that is right. Then he will audition a large number of musicians in order to pick the musicians who can best play that style, is that right?

A. Well, in the event he did not know through experience actual musicians who could play the style, he may audition musicians to fill up the complement of his orchestra.

Q. And in addition to that, he would have to determine if he shall have predominantly stringed instruments or predominantly—what do you call the drums, percussions?

A. Percussions.

Q. Or wind instruments; that is correct, isn't it?

A. Well, that would be based on the styling that he would select.

(Testimony of Harold Eames Bishop)

Q. That is what I mean. [1082] A. Yes.

Q. And it involves many try-outs and auditions, doesn't it, sir? A. It may or may not.

Q. The personnel of—well, how many persons in the Tommy Dorsey orchestra?

A. Well, at the present time, I can't say that I am sure. I know that—

Q. I mean approximately.

A. There are 20 or 25, somewhere in there; there may be a few more than that.

Q. That is approximately the personnel in most of the name bands, isn't it, sir?

A. No. I think that that is probably a little larger than the great number of name bands.

Q. They will run from 15 to 20, will they not?

A. The usual run would run between 15 and 20.

Q. Do you know the price that was quoted to the Pacific Square for Tommy Dorsey?

A. Which price are you referring to? Tommy has played at Pacific Square—

Q. Well, at the time that he played instead of at Mission Beach?

A. If my memory serves me correctly, it was \$7,500 guarantee against 60 per cent of the receipts. [1083]

Q. And the price which he got for playing Mission Beach was what?

A. \$10,000 guarantee against 55 per cent of the receipts.

Q. So, actually, he had a larger guarantee at Mission Beach?

A. Well, the two jobs are not similar. The Mission Beach is a permanent engagement job of a week's stand.

(Testimony of Harold Eames Bishop)

The Pacific Square job is a one-night engagement of three nights duration. So they are two entirely different jobs in the category of price.

Q. The term "one-night stand," as you use it there means an engagement of one, two, or three nights, is that right?

A. Yes; that would be a fair definition.

Q. And anything of a week or more was a permanent engagement; is that correct, sir?

A. That is correct.

Q. The price, then, settled upon, \$7500 against 60 for Pacific Square, compared to \$10,000 against 55 per cent at Mission Beach, you would say that was a lower or higher figure quoted for Pacific Square?

A. You can't hardly compare the prices on one-night engagements against the prices of permanent engagements, Mr. Christensen. They are two entirely different jobs. One-night- [1084] ers always command a higher price than do permanent engagements.

Q. You prepared and distributed the advertising of the Tommy Dorsey engagement at the Mission Beach ballroom, did you?

A. It was prepared under my order; yes.

Q. And you furnished that to Mr. Finley or one of his associates for use in the newspapers, did you not, sir?

A. It was furnished by our publicity department. It may have been furnished direct or through Tommy Dorsey's own publicity staff. I do not quite recall. In many instances Mr. Dorsey supplied his own publicity material on his own engagements.

(Testimony of Harold Eames Bishop)

Q. Did he carry a publicity man or public relations man with him?

A. He has a publicity man, but he does not so-call carry him. I do not believe that he travels with him in his various travels throughout the country.

Q. He is in the employment of the orchestra as an entity?

A. He is in the employment of the orchestra; yes.

Q. At the Beach here in Los Angeles there are two first-class ballrooms there; one, the Aragon, and the other, the Casino Gardens; that is correct, isn't it?

A. Yes, sir. [1085]

Q. And at both places you play your top-flight bands, don't you? A. Yes; I would say so. Yes, sir.

Q. And those ballrooms are located one block apart?

A. Yes.

Q. At times you will play your very top bands against each other there, won't you?

A. As a matter of record, we have played top bands. However, the bands that we have played have been of different styling, Rhumba band against a Swing band, a show band against a Swing band.

Q. Do you personally take care of both of those accounts at Ocean Park, sir?

A. No. I book the Aragon ballroom.

Q. You book the Aragon; and who books Casino Gardens? A. Hal Howard.

Q. Hal Howard. And you furnish them with bands there at both places the year round?

A. The Music Corporation does; yes, supply them with bands.

(Testimony of Harold Eames Bishop)

Q. When I say "you" I am, of course, meaning the Music Corporation of America as well. By the way, who paid your expenses for your trips to San Diego there in connection with the Dailard matter?

A. The Music Corporation of America. [1086]

Q. Then, at all times you were acting in your capacity as a representative of Music Corporation of America, were you, sir?

A. I was employed by Music Corporation of America; I was drawing salary and they were paying my expenses.

Q. You were acting in your capacity as a representative of that company, weren't you?

A. I would say that I was.

Q. Oh, yes. This engagement of Bob Chester and Jack Teagarden at the Pacific Square; you recall the incident when they played together? A. Yes.

Q. Did Mr. Dailard request that booking or did you submit it?

A. I frankly don't know just exactly how that booking did originate. The policy of submitting bands, if there is—

Q. Well, if you do not remember—

A. I don't recall. Yes.

Q. —why, that is the answer. Does the Music Corporation of America offer bands to Mission Beach ballroom?

A. Corporation of America has offered bands to Mission Beach ballroom.

(Testimony of Harold Eames Bishop)

Q. You are referring now to only the three instances: Jack Teagarden and Bob Chester and Ted Fio Rito, aren't you?

A. Those are the three that come immediately to mind; [1087] yes.

Q. Well, there were no others that you know of; that is correct, is it not?

Mr. Warne: May we ask that the time be fixed?

Mr. Christensen: During the year 1945, sir.

Mr. Warne: And after the lawsuit was filed?

Mr. Christensen: During the year 1945, sir.

The Court: Well, I think it should be a little more specifically split than that. In other words, the letter of February 25th may have an important bearing on that, Exhibit K.

Those are the three bands that you referred to in that letter?

The Witness: Yes, sir.

Q. By Mr. Christensen: Are there any others that come to your mind as having been submitted during the year 1945, sir?

A. Not that I can—not that I can recall right now.

Q. Do you recall what the price quoted for Jack Teagarden was?

A. The price quoted for Jack Teagarden, I believe, was \$2,500 guarantee against a privilege of 50 per cent for a 3-day booking.

Q. Do you recall the price for which that same band was quoted to Pacific Square? [1088]

A. On following engagements?

(Testimony of Harold Eames Bishop)

Q. No. I mean on the engagement that we are speaking of now, where Bob Chester and Teagarden played together?

A. I do not recall the price that the band was quoted. I know that the band was paid—I think I had better check my records to be absolutely sure. I think it was \$2,500 flat, with no percentage.

Q. Do you recall the price for which Bob Chester was quoted to Mr. Finley for engagement at Mission Beach?

A. I believe—and I would have to verify my records to be absolutely certain—that that was—I do not recall the quoted price, but the contracted price, I believe—which I would like to verify on my records—was \$2,500 flat.

Q. And the quoted price to Mr. Finley was what, sir?

A. The quoted price to Mr. Finley for a three-day booking was \$2,500 guarantee against 50 per cent.

Q. Will you give me the date of that conversation you have related as having taken place between you and Mr. Finley on the boardwalk down here at Ocean Park, sir?

A. I can only give you just a general estimate of that date.

Q. Will you, please?

A. I think it was a weekend some time during July, as I recall. It was in mid-summer. [1089]

Q. You could help us if you could fix it any more definitely. I would appreciate that, sir.

A. Actually, I don't even recall the band that was appearing at Casino Gardens. I am sorry. I won't be able to help you fix that any more definitely.

Q. Very well. I believe you made the statement that the \$10,000 booking with Mr. Finley was the highest that

(Testimony of Harold Eames Bishop)

Mr. Dorsey had received for any booking; is that correct or not, sir? A. I did not make that statement.

Q. That is not true, is it?

A. I do not know whether it is or whether it isn't.

Q. The booking there at Mission Beach of Tommy Dorsey was handled by Music Corporation of America, that is to say, the physical preparation of the contract?

A. Yes.

Q. And for that you received—"you"—M. C. A. received only ten per cent?

A. Received our regular commission as stipulated in the contract.

Q. That was ten per cent on that engagement, is that right?

A. It was ten per cent on that engagement; yes.

Q. Whereas, if you had booked him into Pacific Square for this weekend at \$7,500 you would have received 20 per cent, [1090] wouldn't you?

A. No. We would have received the commission for a one-night engagement, which would have been in the instance of Tommy Dorsey 15 per cent.

Q. Has he a special rate with M. C. A.?

A. I wouldn't say that there is any special rate; no.

Q. Well, your rate of commission is 20 per cent, is it not, on one-night engagements?

A. In many instances it is 20 per cent; in many instances, at 15. There is no special dispensation, to my knowledge, between the two.

Q. What determines whether it is 15 or 20, if you know?

A. I can only qualify that by saying that on all the bands that I have signed management contracts for the

(Testimony of Harold Eames Bishop)

Music Corporation of America, the contracts were secured on the basis of 20 per cent commission. The contract with Tommy Dorsey on 15 per cent I did not secure with Mr. Dorsey, so I do not know what the nature of the discussions were.

Q. You told us about a conversation which took place down at the Trianon ballroom on the evening or late afternoon of November the 8th of 1944, that being the date on which the Council made the actual awarding of the bid. You recall that, do you? [1091]

A. I recall the matter, yes.

Q. In addition to yourself, Mr. Bishop, will you state again who was present, sir?

A. Mr. Howard was present, and for at least a portion of the meeting there was another gentleman there, who I do not recall.

Q. That was Mr. Mirken, wasn't it?

A. I do not recall his name. I do not know.

Q. It was the resident manager there, wasn't it, that you are referring to?

A. I wouldn't say for certain. It might have been.

Q. Now, at that time and place did not Mr. Finley say to you that he, Mr. Finley, thought that you had hit a new low in lowness by coming down to appear before the City Council to testify as to Dailard having an exclusive on bands in San Diego?

A. Mr. Finley made no such statement to me.

Q. At that time and place did Mr. Finley say to you that it was the rottenest thing in calling Ralph Wonders of General Amusement and asking Ralph Wonders to come down and appear with you?

A. He made no such statement.

(Testimony of Harold Eames Bishop)

Q. At that time and place and in the presence of the persons I have mentioned, did Mr. Finley also say to you that the lowest thing of all was in calling Jack Flynn on the [1092] telephone a week previous to that time and telling Flynn that Dailard had been awarded the lease at Mission Beach?

A. He made no such statement.

Q. Did Mr. Finley at that time also say to you that you had requested Flynn to write a letter to Dailard refuting his letter to Finley listing the bands?

A. Would you repeat that question, please?

(The question was read.)

A. There was no such discussion.

Q. Now, I gathered from your statements that you didn't regard Mission Beach Ballroom as very important to you or to Music Corporation of America; is that right?

A. Mission Beach Ballroom was important to Music Corporation of America.

Q. And in what way was it important, sir?

A. It was important primarily in the competitive field, wherein the operation that had been maintained at Mission Beach prior to that time enabled the bands which we represented to take out considerable grosses at Pacific Square. In the opinion of myself, there was not room in San Diego for two name ballroom operations; operating competitive to each other, they would both lose money because of the lack of demand for that particular type of business or entertainment in that area.

Q. Now, since both you and Mr. Dailard didn't think so [1093] much of Mission Beach Ballroom, will you tell me why you two made such an effort to keep Mr. Finley from getting it?

(Testimony of Harold Eames Bishop)

Mr. Warne: If the court please, I object to this witness testifying as to why Mr. Dailard did something. I have no objection to any conversations with Mr. Dailard, but I do object on that ground.

The Court: I think the question is objectionable. Sustained.

Mr. Christensen: I will withdraw it. That is all. Thank you.

Redirect Examination

By Mr. Warne:

Q. May I have a question or two, if you please?

A. All right.

Q. With reference to the Misison Beach Ballroom—

Mr. Warne: If I may stand here, your Honor.

The Court: Certainly.

Q. By Mr. Warne: With reference to the Mission Beach operation you have expressed an opinion as to its being a possible successful operation. What type or character of operation did you believe could be successful there?

A. The operation that had been previously successful at Mission Beach, which was the presentation of western orchestras.

Q. Of western orchestras. Give the names of some of them. [1094]

A. Bob Wills and his Texas Playboys, for one, and Happy Perryman; bands of western calibre and of name value.

Q. Your opinion, is that based now on a conclusion or on different types of entertainment which were offered there?

(Testimony of Harold Eames Bishop)

Mr. Christensen: That is objected to as a conclusion.

Q. By Mr. Warne: Speaking from experience only.

The Court: Overruled.

The Witness: From actual experience, in having played Bob Wills at the Mission Beach Ballroom for a considerable period of week-ends, the grosses were very satisfactory, and the experience led us to believe that there was a tremendous demand in that area for that particular type of entertainment.

Q. By Mr. Warne: Now, with reference to Mission Beach and bands at Mission Beach, there have been no bands or orchestras suggested or offered to Mr. Finley since this law suit was filed; is that correct? At Mission Beach, I am referring to.

A. Since the law suit was filed?

Q. Correct, which was in March of last year.

A. There is a vague recollection of a conversation that was had with Mr. Finley pertaining to the submission of Bob Wills.

Q. Do you have any distinct recollection about it?

A. I have no distinct recollection about it, however. [1095]

Q. I see. Now then, has Mr. Finley requested of you, or of any one else in M. C. A., so far as you know, the booking of any bands at Mission Beach since he filed the law suit? A. Not to my knowledge.

Q. By the way, you answered a number of questions with reference to how bands operate, are gotten together, and so forth. Where did you get all that information about—I will put it this way. I withdraw that. When

(Testimony of Harold Eames Bishop)

did you first start to become interested in the operation of bands or orchestras?

A. When I first became associated with Music Corporation of America, approximately eight years ago.

Q. Did you ever indulge in it in an amateurish sort of way, before you got a job there?

A. No, I did not.

Q. Your experience has been by reason of what?

A. My experience has been by reason of my association in the business of booking orchestras with Music Corporation of America.

Q. And your acquaintance with musicians, I take it, and band leaders?

A. That is correct.

Q. You spoke of one-nighters commanding a higher price, and then the figure of \$10,000.00 has been suggested against \$7,500.00. How do you figure \$7,500.00 being a higher price [1096] than \$10,000.00?

A. Well, the \$7,500.00 was for a three-day engagement. The \$10,000.00 was for a six-day engagement.

Q. I see. In other words, you are then figuring or computing it on the basis of the daily return; is that correct?

A. On the basis of the daily return.

Q. You speak of the booking at the Aragon and the playing of orchestras at the Aragon and Casino Gardens. Do any other agencies book into Casino Gardens, do you know?

A. Yes, I believe that General Amusement has had orchestras in Casino Gardens. In fact, I think that at one time or another all agencies have had orchestras in Casino Gardens.

Q. With reference to this matter of not putting a swing orchestra against a swing orchestra, I think you

(Testimony of Harold Eames Bishop)

used that term, at the Aragon and Casino Gardens, would you elaborate on that, just what you mean in that regard?

A. There is a distinct following for different types of music. There are people who particularly like the swing band music and do not care at all for the sweet rhumba type music. I think the best contrast is the actual contrast between the booking of Xavier Cugat, who is a rhumba band, and I believe the time Cugat played either Jimmy Dorsey or Tommy Dorsey or Harry James, one of those three bands, was at [1097] the Casino Gardens, and they are equally great in their own right. Both places were able to enjoy a tremendously successful business because the demand did not conflict. In the Aragon you saw almost an entirely different type of people than you saw at the other, in the Casino Gardens Ballroom. You saw a lot of Mexican element, of people who wanted to do the rhumba type of music, as opposed as the younger bobby-sox type element that liked the swing music at Casino Gardens.

Q. Now, do you know whether Teagarden's band and FioRito's band played at Pacific Square after this engagement—I believe the first engagement was in February?

A. Yes, both Jack Teagarden and Ted FioRito have played engagements at Pacific Square since that time.

Q. Have they been booked in there more than once, either one of them?

A. To my best recollection, Mr. Jack Teagarden's orchestra has been booked only once; Ted FioRito's orchestra has been booked twice.

Mr. Warne: Now, if the court please, the questions I want to ask now are really direct, and I would ask leave to go into them. There is a matter which I overlooked

(Testimony of Harold Eames Bishop)

going into in the first instance. It is an entirely different subject-matter, if I may.

The Court: Very well.

Q. By Mr. Warne: Do you know Mr. Birnie Cohen? [1098] A. Yes, I do.

Q. You saw him testify here as a witness against you in this law suit? A. I did.

Q. You recall that the law suit started here on the 29th of February? A. Yes.

Q. Or, correction,— A. Tuesday. Of January.

Q. Of January, rather? A. Yes.

Q. When next, before that time, the time he appeared as a witness, did you see Mr. Cohen?

A. I saw Mr. Cohen on the Friday preceding the commencement of this law suit.

Q. Where? A. In my office.

Q. That is on Wilshire Boulevard?

A. On Wilshire Boulevard.

Q. Did you have a conversation with him at that time? A. Yes, I had a conversation with him.

Q. Any conversation about him testifying as a witness here?

A. There was no particular conversation about testifying as a witness in this trial, no. [1099]

Q. Will you relate the conversation at that time?

Mr. Christensen: To which we object as hearsay.

The Court: I don't recall the foundation being laid for that.

Mr. Warne: It was, your Honor.

The Court: You have transcript here. You can refer to it. Let's examine the record. It may have been, but I don't recall it.

(Testimony of Harold Eames Bishop)

Mr. Warne: At page 135, your Honor.

The Court: Yes, that is correct. You are correct.
Objection overruled.

Mr. Warne: Would you read the question, Miss Reporter, please?

(The question was read.)

The Witness: A. I knew that Mr. Cohen was no longer—I had been advised; he had advised me—employed at the Casino Gardens, and I asked him, as a matter of personal observation, what his opinion of Mr. Larry Finley was, just after—because he had had experience with him for a period of time, and Mr. Cohen stated to me in very definite terms that, in his opinion, Mr. Finley was a phony, and he said something about being a two-bit chiseler.

Q. By Mr. Warne: Was this conference you had with Mr. Cohen one that you had solicited or arranged?

A. No, I had no appointment with Mr. Cohen. I didn't [1100] know he was coming in at all.

Q. Had he prior to that time, to that occasion, come to your office or come to the office of the Music Corporation of America?

A. Mr. Cohen would come to the office quite regularly, just to sit down and have conversations.

Q. And he bought bands on numerous occasions?

A. Yes, he did.

Mr. Warne: Cross-examine.

Recross Examination

By Mr. Christensen:

Q. Did you tell him, did you say to Birnie Cohen. "Well, Birnie, I don't think a man that will pay one of

(Testimony of Harold Eames Bishop)

his employees half of his salary all the time that he is in the armed forces of our government is a two-bit chiseler”?

Mr. Warne: Just a moment. I object to that question upon the ground there is no foundation laid, it is argumentative in form, it is an attempt to interject new and different items in this law suit, not relative to the examination of the witness made at first, is wholly immaterial, and calls for his conclusion and opinion.

Mr. Christensen: I am asking if he said that to Mr. Cohen.

The Witness: A. No.

Mr. Christensen: All right. [1101]

The Court: He has answered it now. Read that question, please, Mrs. Zellner.

(The question was read.)

Mr. Warne: If the court please, may I request, inasmuch as the witness answered the question before your Honor had ruled, that the answer be stricken and that my objection be ruled upon?

The Court: I think so. The motion to strike is granted. Ladies and gentlemen, you will disregard that answer. The objection is sustained to the question.

Q. By Mr. Christensen: Well, did you say anything to him when he told you these things?

A. No, it was just a general discussion there for a few minutes about Mr. Finley.

Q. Tell me the discussion. It wasn't all Birnie Cohen talking, was it? You said something?

A. For the most part, it was Birnie Cohen talking. I wanted to learn what his opinion of Larry Finley was.

(Testimony of Harold Eames Bishop)

Q. What did you say to him?

A. "What is your opinion of Larry Finley after you have been in business with him for a period of time?"

Q. That is all you said to him?

A. Well, I believe that was all we said about Mr. Finley. After he had given me his opinion of Mr. Finley, we went on to other subjects, and then he went over to Mr. Howard's [1102] office.

Q. What other subjects?

A. That I discussed with Mr. Cohen?

Q. Yes.

A. The subject of having a meeting of a group of people who are members of our company for the purpose of playing golf. There is a little South of the Techachapi Club, and we occasionally played golf, and at that time we discussed the possibility of having another golfing session.

Q. What was the business conversation, if any, there was on that occasion between you and Mr. Birnie Cohen?

A. There was no business conversation between myself and Birnie Cohen.

Q. Was there any business discussion between Mr. Cohen and any one else, while you were present?

A. Mr. Cohen was in my office, and I believe Mr. Howard came in my office, and then he went into Mr. Howard's office. I did not go in. I don't know whether business was discussed with Mr. Howard.

Q. Did Mr. Cohen tell you at that time, or did you ask him if Mr. Finley made money for Casino Gardens while he was managing it?

A. I didn't ask him that question, no.

(Testimony of Harold Eames Bishop)

Q. Now, you say that you believe that you had offered to Mr. Finley Bob Wills. You say you have a vague recollection [1103] of that?

A. I have a vague recollection that possibly that conversation took place by telephone.

Q. Is there anything more definite than the statement that you have just now made, that you have a vague recollection of the possibility of such a telephone conversation?

A. The only thing is I have a recollection, a vague recollection, of such a call.

Q. Now, you said that at the Casino Gardens and at the Aragon you played these two great attractions; is that right? You were referring to Cugat and Tommy Dorsey?

A. They are both great attractions, yes, sir.

Q. By that you mean it would bring people from a long distance to dance to them?

A. Well, through the drawing area, wherever people are interested in going, they will go.

Q. Well, it is not uncommon at all for people to make a trip of miles to go to a ballroom to dance?

A. Well, I don't know that you can set any general rule as to how far people are willing to go for any particular type of attraction. They come from the competitive—or, an area of demand, for the most part.

Q. Now, the ballroom there at the Beach draws from all parts of Los Angeles, doesn't it?

A. I believe, in my opinion, my own personal opinion, [1101] I believe it does draw from pretty generally all of Los Angeles.

(Testimony of Harold Eames Bishop)

Q. Likewise, for example, the Palladium, which is located in Hollywood, draws from all over Los Angeles?

A. Yes.

Q. Then it is true that when a particular big name attraction is playing at a location, people will go many miles to dance to it?

A. Yes, if there is a great name attraction playing. The reason it is a name attraction is because it is able to draw people and people will be drawn to great name attractions.

Q. You were here when Mr. Dailard testified that people left San Diego and traveled up to the Palladium when he couldn't get name bands, weren't you?

A. Will you read that question, please?

(The question was read.)

Mr. Doherty: I think, your Honor, that is an unintentional misconstruction. Mr. Dailard, as I remember, said that in his ballroom people who had been at the Palladium would ask him about his future attractions; not that they traveled up here merely to the Palladium, but that they had been to the Palladium and asked him about his attractions.

Mr. Christensen: I can refer your Honor to the record.

The Court: There is nothing before the court. I am not going to enter into a dispute as between counsel as to what [1105] the record shows. You have the record here. There is no objection to the question.

Q. By Mr. Christensen: Will you answer the question?

A. I evidently wasn't paying attention during the time Mr. Dailard made that statement.

(Testimony of Harold Eames Bishop)

Q. From your experience, would you say that people do travel the distance, say, from San Diego to dance at the Palladium?

A. I know of no definite experience of any person that has traveled that far. There is a possibility that they could have, but I don't know of any one instance where the person has traveled that far just particularly to hear a band. It is possible that they could have.

Q. You say you decided that Mission Beach was not the place to play name bands; is that right?

A. I don't believe that I made that statement. I said that— I don't know that I made that statement.

Q. What is the situation? Did you?

A. Well, the situation—

Q. I say, did you?

Mr. Warne: Just a minute. The record is the best evidence on that.

Mr. Christensen: No. I say, did you decide that?

Mr. Warne: Oh, I am sorry.

The Witness: That Mission Beach is not the best place [1106] to play name bands?

Q. By Mr. Christensen: Yes.

A. I, in my own mind, believe in a comparison between Mission Beach and Pacific Square, that Pacific Square on a year-around operation will be able to serve the dancing demands of the people of San Diego much better than the Mission Beach Ballroom.

Q. And having decided that, then you proceeded to give all of the name bands to Pacific Square; is that right?

A. The bands were anxious—

Q. No, you can tell me yes or no.

A. I can't answer that yes or no.

(Testimony of Harold Eames Bishop)

Mr. Warne: I submit the answer started is the correct one, and I think the witness should be permitted to finish his answer.

The Court: I am afraid I wasn't paying as close attention at this point as I should have. Will you read that, please?

(The record was read.)

The Court: I don't know whether the witness was interrupted by counsel or not.

Mr. Warne: He was.

The Court: He should not be interrupted by any counsel. He should complete his answer, and if it isn't satisfactory to the questioner, the questioner can move to strike it out. Do not interrupt the witness. Proceed. [1107]

Q. By Mr. Christensen: Go ahead.

A. The bands were anxious to make the most money that was possible for them to make. I believe that most of the bands which my company represents had at one time or another, or a great majority of them, appeared at Pacific Square and made an excellent amount of money out of Pacific Square. So far as booking the place, when a program or itinerary was discussed with a band leader, the band leader would say, "Immediately following"—for example, would say, "Immediately following my closing at the Palladium, I would like to play at Pacific Square," and the arrangement would be negotiated.

Mr. Christensen: I move to strike that as hearsay.

The Court: Motion denied.

(Testimony of Harold Eames Bishop)

Q. By Mr. Christensen: This, you say, is conversation you had privately with some band leaders?

A. Well, as a general rule, with all band leaders when it came to a discussion of their itinerary, yes.

Q. Now, Sammy Kaye, for example, you know him?

A. Yes.

Q. Did he tell you he wanted to play Mission Beach?

A. Well, you are going back, I believe, to 1942 now, or early in 1943.

Q. You know he is coming out here now, don't you?

A. Yes, I know he is. [1108]

Q. That is the occasion I am talking about.

A. I don't know whether Sammy Kaye has requested that or not. Mr. Barnett had discussions with Mr. Kaye's personal manager, and he asked for the submission of an itinerary of engagements for him. That itinerary was drawn up and has been forwarded to him for his approval or disapproval.

Q. That is the practice in your company, to make up these itineraries for your bands; is that right?

A. Well, I possibly used the word "itineraries" a little bit different, in its usage in our business. An itinerary in our business is a recapitulation of all the information on the contracts which have already been re-negotiated, or, negotiated. So that a band leader will not have to carry a complete file of contracts with him, on one or two sheets of paper there is a recap of all the dates that the band leader has in this particular schedule of dates, and so he can see and refer to this one sheet of paper and have all the information that is contained in possibly 15 or 20 contracts. And that is what we call an itinerary.

(Testimony of Harold Eames Bishop)

Q. So that if you have a band coming out here or available in the Los Angeles or San Diego area, then you book it into Pacific Square?

A. If we have a band that is available in this area, and there is an opening at Pacific Square, and if, in my opinion, the Pacific Square—the band would be able to [1109] realize more money for itself, I would suggest or recommend that the band leader play Pacific Square.

Mr. Christensen: That is all. Thank you very much, sir.

Redirect Examination

By Mr. Warne:

Q. Am I to understand, then, you would be concerned only with the maximum return to the band leader?

A. That is our primary concern, yes.

Mr. Warne: No further questions. [1110]

Mr. Warne: Mr. Barnett.

The Court: I believe we will make better time by taking our recess now than continuing along with Mr. Barnett's testimony.

Ladies and gentlemen, we will take a recess for a few minutes. Remember the admonition and keep its terms inviolate.

(Short recess.)

The Court: All present; proceed.

Mr. Warne: Mr. Barnett.

LAWRENCE BARNETT,

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you spell your name completely? It has several different spellings in the record.

The Witness: Barnett, B-a-r-n-e-t-t.

The Clerk: And the Lawrence is "u" or "w"?

The Witness: L-a-w-r-e-n-c-e.

Direct Examination

By Mr. Warne:

Q. Commonly referred to in the conversation and trade as "Larry"? A. Correct.

Q. Your business or occupation, Mr. Barnett? [1111]

A. I am a salesman.

Q. Connected with what company?

A. Music Corporation of America.

Q. Are you an officer of that company?

A. I am.

Q. What office do you hold? A. Vice-president.

Q. How long have you been with the Music Corporation of America? A. Approximately ten years.

Q. And in what particular department, if you are in a particular department?

A. I am in the band department.

Q. And you have been in that department ever since you have been with M. C. A.? Let us call it "M. C. A."

A. Yes.

Q. Prior to that time you were engaged in what occupation?

A. I was going to college and I had a booking office in college.

(Testimony of Lawrence Barnett)

Q. Booking what? A. Orchestras.

Q. Was that for a commission? A. Right.

Q. Did you have any other paid employment prior to the [1112] time that you came with M. C. A.?

A. I worked for three months with the Columbia Broadcasting Company.

Q. In what capacity? A. As a salesman.

Q. Selling attractions? A. Selling bands.

Q. As an officer of the company have you any particular occupation or duties insofar as the band department is concerned?

A. I am coordinator of the West Coast Band Department.

Q. Of the West Coast Band Department?

A. Yes.

Q. Will you tell us about other band departments? Are there other band departments elsewhere in the United States?

A. There are other band departments in New York, Chicago, Cleveland, Detroit, Dallas, and San Francisco is combined with the Los Angeles Band Department.

Q. Well, as coordinator, does that mean that you have charge of it generally? A. Right.

Q. And Mr. Bishop works under you?

A. With me.

Q. With you? [1113] A. Right.

Q. But under your general supervision, is that correct? A. Right.

Q. The same is true with Hal Howard?

A. Right.

Q. What about Lyle Thayer who has been referred to here? A. That is correct.

(Testimony of Lawrence Barnett)

Q. And a number of other salesmen?

A. Approximately 11.

Q. 11 salesmen who are under your jurisdiction generally in the Los Angeles office, is that right?

A. Los Angeles and San Francisco.

Q. And any other employees of that sort who are under your general control or jurisdiction?

A. Well, the secretaries that work for the men.

Q. I see. In other words, you have general charge of that whole end of the business, is that correct?

A. That is correct.

Q. And the band department—I believe you call it that—in your business, the band department is now on Wilshire Boulevard, separate from the other M. C. A. enterprises over on Burton Way?

A. Yes, sir.

Q. Are you an officer of any other corporation or affiliated corporation? [1114]

A. I am secretary of Movie Corporation.

Q. Do you do any work in Movie Corporation?

A. I don't do any work for them; no.

Q. I see. With reference to other agencies, are you familiar with other agencies that are in the band business or the band booking business?

A. I believe I am.

Q. And what are the principal other agencies?

A. William Morris, Frederick Brothers, General Amusement, Moe Gail. There are a lot of them. I can't remember exactly the exact names.

Q. These you have mentioned, Frederick Brothers, for instance, that has been mentioned here; is that one of them?

A. Yes.

(Testimony of Lawrence Barnett)

Q. These other agencies, do they have offices in the principal cities throughout the United States?

A. They do.

Q. And they represent other bands and attractions?

A. Right.

Q. What would you say with reference to competition between the agencies as to representation of bands and selling—that is the term that is used—of bands?

A. I think it is very competitive. There are numerous agents in every town that you try to sell a band in.

Q. There has been some mention here of splitting [1115] commission or splitting commissions. Have you any knowledge of splitting commissions in the selling of bands between agencies on occasions?

A. It is very common.

Q. It is very common? A. Yes.

Q. Not just in San Diego? A. That is true.

Q. And with reference to splitting of commissions on particular orchestras or bands, does that occur on occasions? A. It does.

Q. Will you explain, if you please?

A. We have split commissions on several bands with William Morris. They have given us a commission and we have given them a commission. In fact, we gave them all the commission on an Artie Shaw booking.

Q. That was in San Diego, you mean? A. No.

Q. Elsewhere?

A. It was elsewhere, all up and down the Coast. We gave them half the commission on Al Donahue; we gave them half the commission on Al McIntyre. These bookings were up and down the Pacific Coast.

(Testimony of Lawrence Barnett)

Q. What about Tucker?

A. Orin Tucker, we split commission with the Frederick [1116] Brothers.

Q. Frederick Brothers? A. Right.

Q. And you split commission with G. A. C.?

A. We split commission with General Amusement on engagements to Meadow Brook and Cedar Grove, New Jersey.

Q. What was that, a ballroom?

A. That was a ballroom—a night club, I would call it, a combination of the two.

Q. On splitting the commissions there, if you know about that, how does that work?

A. Well, they were servicing a spot for the owner of the spot, Frank Daly, and they apparently needed bands and they asked us for certain bands available. We had bands available for a time, and they asked us for part of the commission and we gave it.

Q. That is common in the business?

A. That is common in the business.

Q. You know that you are a licensed agent?

A. Right.

Q. Are you licensed as a sub-agent? A. Right.

Q. Personally? A. Right.

Q. And the other salesmen that you have, are they [1117] licensed sub-agents, if you know?

A. Correct.

Q. By the American Federation of Musicians?

A. Correct.

(Testimony of Lawrence Barnett)

Q. In the representation of bands just what do you understand by that as far as your company is concerned?

A. Well, we counsel them, aid and help them in any manner we possibly can, and represent them in getting engagements for them.

Q. Well, you say you counsel them. What do you counsel them about?

A. Well, the best way would be to give you an example, possibly.

Q. All right; let us have it.

A. Joe Reichman comes in the office and he says he would like to go to New York.

Q. Joe Reichman is a band leader, is that correct?

A. Correct.

Q. Go ahead.

A. He says, "Where can you book me?" So we try to figure out where we can book him in New York. He says, "I have a payroll of so much for my orchestra," and tells us what price he wants for the band. We go around to the various hotels and cafes to see if we can get him engagements that will pay him that type of money. And we go back to Reichman [1118] and say, "We can get you the following engagements," and sometimes he will take the engagements and sometimes he will turn them down. We will show him how the time is good on this radio, and tell him, "It will help you and do you a lot of good."

Q. Is it part of your business to know who has one of the spots or places where employment can be obtained?

A. That is right.

(Testimony of Lawrence Barnett)

Q. And is it part of your business to assist in the development of the operations where employment for band leaders can be obtained?

A. We try to create employment for our band leaders.

Q. With reference to this matter of price, you mentioned Reichman. Any other band leaders? How is the matter of price that is to be paid to them and for them and their orchestra determined? How is that determined?

A. The orchestra leader himself decides on the price. He can accept or reject an engagement.

Q. Well, let me ask you this: Is there a general price for which an orchestra plays ordinarily during a given period?

A. No; there is no general price at all.

Q. Insofar as any one orchestra—let us take Reichman—do you know what price he is getting for the engagement, or asking? [1119]

A. Yes. He asks different prices. Sometimes he takes one price in Los Angeles, because he wants to stay here and has a home here, and asks a different price in New York.

Q. That is true of all of the others?

A. Practically all the leaders. It depends on where they want to go. If they are anxious to go to Los Angeles, they might take a better price than they would to go to New York. If they don't want to go to New York, they will probably ask for more money, for New York than they would for Los Angeles.

(Testimony of Lawrence Barnett)

Q. Do they ask you with reference to a price when they suggest one? Do they ask you to counsel and advise on it?

A. They ask us to help them. They usually say, maybe, what some of the other orchestras have been getting on that job, and we try to tell them.

Q. There has been a mention of gross, or, rather, a percentage of gross here in the case of Tommy Dorsey and, I believe, some of the other contracts. Is it a custom in the trade to put the compensation on the basis of gross receipts?

A. It is a custom in the trade; yes.

Q. What is the usual top?

A. The usual custom is 60 per cent.

Q. That is what the orchestra leader usually wants to get?

A. Correct. [1120]

Q. And is that what you usually try to get for him?

A. That is what we try to get.

Q. Does he sometimes take less?

A. Sometimes he will take less if he wants the engagement.

Q. Do you recommend he take less?

A. Sometimes, if the guarantee is higher.

Q. With reference to other agencies do you know how they work and operate in that regard?

A. Well, I imagine—

Q. Well, not you "imagine." You have not worked for any other agency, have you?

A. I haven't worked for any other agency.

(Testimony of Lawrence Barnett)

Q. Well, I will keep away from it. With reference to bands, there has been a lot of talk here about great bands. I believe Mr. Bishop just referred to name bands and other such things, and there has been a reference to Tommy Dorsey and the fact that he, I believe, received \$10,000 for playing one week. Let me ask you this: The price of \$10,000, is that commonly paid for orchestras per week? A. No; it is not.

Q. At a ballroom?

A. That is very high. In fact, I don't remember of ever hearing any other ballroom paying as high a price.

Q. Let me ask you this: Are there other orchestras in [1121] the United States, or many other orchestras who are comparable to Tommy Dorsey in price or in the price that they can demand for services?

A. Very, very few.

Q. When you say "very, very few," could you number them or could you put it in numbers?

A. Well, I don't imagine there are over ten, if there are that many.

Q. Are those ten always in Los Angeles or the Western territory?

A. No; they are spread out through the United States.

Q. Where is the principal demand for orchestras, dance orchestras of this character?

A. On the East Coast.

Q. And that works out of what office?

A. New York office.

(Testimony of Lawrence Barnett)

Q. The ten, you say, are spread throughout the United States. Do you know any places that can use these orchestras, that make demand on them for their services?

A. We know the places, because practically everybody wants the top bands, but they are not always available for them.

Q. That is, a man can only play one place?

A. That is right; at a time.

Q. At a time. And these ten that you refer to now, do [1122] you know how they are spread throughout the United States at this time?

A. Tommy Dorsey is in New York.

Q. Cugat's name has been mentioned.

A. Cugat is in Florida; Les Brown is in New York. If I had a list, I could probably tell you exactly where they are. We keep that list.

Q. Well, how many of them are in Los Angeles territory at the present time?

A. Harry James, Gene Krupa. That is about the only two that are in the town, that are playing dance engagements, available for dance engagements.

Q. In other words, those are the only two that are present at the present time?

A. Correct.

Q. Would you say that that condition generally obtains, that is, that spread of these top ten, if you want to call it that, throughout the United States?

A. I would say that is, generally, throughout the year.

Q. You never have the ten out here at one time?

A. No.

Q. Let me ask you about the availability of these types of bands, generally, in November, December and January of—rather, November and December, 1944, and

(Testimony of Lawrence Barnett)

January, 1945, on the West Coast, of their availability here. First, let me [1123] ask you this question: How far ahead are those types of bands usually booked?

A. The larger the name band, the further ahead we usually book them.

Q. And that will extend how far?

A. Oh, it can extend up to a year. We usually book them for dance engagements, maybe 45 days to 50 to 90 days ahead.

Q. Have you any present recollection of the bands that were available in the months that I mentioned here in Los Angeles at that time? If you have not any present recollection, I will withdraw the question.

A. I have records. It is so much easier for me to look it up, but I can tell you in a minute.

Q. Now, there are other bands that are not of the big ten—let us call it that—or of this Tommy Dorsey category. What other price bands are there that are mentioned as being amongst the leading dance orchestras in the country? A. It is a very broad question.

Q. Well, all right. Is there any way, by way of price or category, that you can fix it? Let us say \$3500 bands? Are there bands that sell for that?

A. There are; yes.

Q. Any that sell for \$5,000?

A. Correct. [1124]

Q. And these big ten, at \$5,000 a week, would you say that they played for that amount of money?

A. Some do; some play for more, and maybe might take an engagement for less, depending how badly they wanted it.

(Testimony of Lawrence Barnett)

Q. How about \$3,500; does that reach down to a category of a number of bands?

A. That happens to be a larger category of bands.

Q. How many would you say would fall into that category? A. I imagine about 30 bands.

Q. When you get down to \$2,500 that would take in about how many? A. I imagine 75.

Q. That is, throughout the country?

A. That is throughout the country.

Q. And includes all agencies?

A. No. That includes our bands, because I wouldn't have these exact figures on the other agencies' bands.

Q. What about the other agencies; have they name bands in each one of these categories?

A. I imagine they do; yes.

Q. Do you know all the bands that they have, or at least some of them? A. Yes.

Q. In the top category, for instance?

A. Yes. [1125]

Q. And that is true of all of it, or I might say of the General Amusement? A. Yes.

Q. It is true of William Morris? A. Yes.

Q. Do you remember an occasion that these contracts—well, first, an original contract that has been introduced in evidence here, Defendants' Exhibit E, do you remember the occasion of that being executed? A. Yes.

Q. The general lawyer-like language is in there. Who composed it?

A. I don't remember exactly who composed it.

Q. Well, did you have anything to do with it?

A. I had something to do with it. I remember I revised part of it.

(Testimony of Lawrence Barnett)

Q. Well, is your revised part of the language before it was finally executed? A. Correct.

Q. Then it went into Mr. Cramer for execution?

A. Right.

Q. At that time he was an officer of the company?

A. Correct.

Q. And you were not an officer of the company?

A. That is right. [1126]

Q. Did you have any conversation with anybody in your company relative to the signing of this contract—or, rather, the execution of it, the drawing of it, or the fact it should be executed? Was it discussed; that is the point?

A. I think the only person that discussed it was Mr. Cramer, the man who signed it.

Q. Was it discussed with Mr. Bishop?

A. Correct; Mr. Bishop.

Q. At the time this was signed, Mr. Bishop was servicing accounts—do you use that term?

A. That is correct.

Q. —serving the Dailard account? A. Correct.

Q. Prior to that time who had worked the account there? A. I believe Lyle Thayer.

Q. Did you actively handle this account?

A. No; I have never serviced Mr. Dailard actively.

Q. Did you make trips on occasion down there to his operation? A. No; I haven't.

Q. Usually when he came into the office would he see you or some other man?

A. He saw Mr. Bishop.

Q. Did you approve the form of this agreement before it was signed? [1127] A. Yes.

(Testimony of Lawrence Barnett)

Q. At the time you gave that approval was there any intention on your part to prevent or restrict the competition and the trade in bands in San Diego? A. No.

Q. Was there any intent on your part to restrain the booking of bands in San Diego by the execution of this agreement or your approval of it? A. No.

Q. In 1944, in May, Defendants' Exhibit F was executed, according to the date upon the instrument. Do you remember that contract? That is the Dailard-M. C. A. contract, the formal contract. A. Yes, I do.

Q. Did you see it before it was signed?

A. Yes.

Q. Did you approve it? A. Yes.

Q. It was in effect—it was substituted and took the place of the letter agreement of November 4, 1941; is that correct? A. Correct.

Q. At the time this was executed did you know Mr. Finley; that is, I am speaking now of Defendants' Exhibit F; that is the May, 1944 contract? [1128]

A. No.

Q. Had you ever met him?

A. I had never met him.

Q. Was there any intention on your part in approving this contract—as it bears someone else's signature—was there any intention to restrict the business of booking bands or entertainment in San Diego? A. No.

Mr. Warne: If the court please, counsel—may I approach the bench?

The Court: Yes; both of you had better approach the bench.

(Testimony of Lawrence Barnett)

(Conference between counsel and the court in low tones as follows:)

Mr. Warne: In examining this witness, I heard, turning his face toward the jury, Mr. Christensen say audibly enough so that I could hear it clear back where I was: "If he answers this question 'yes' I will drop dead."

Mr. Christensen: I was talking to Mr. Finley.

Mr. Warne: I know you were, but it was in such a voice—

The Court: They can hear everything you say in here. You should not make any such remark, you know.

Mr. Christensen: I did not know it was that loud. This is the first and only time you have heard anything.

Mr. Warne: There was a remark by Mr. Finley yesterday [1129] that I overheard while the jury was still there. I did not say anything yesterday.

Mr. Christensen: I did not hear it.

Mr. Warne: I am not saying that you did.

The Court: You should have your conferences, gentlemen, either in a very low voice, or outside the courtroom. This plaster here is designed for the purpose of accelerating sound. It is a composition plaster that is made for that purpose. I can speak in this tone, for instance, and if there is anyone in the courtroom, it can be heard in that end of the courtroom. So, if you will refrain from those remarks?

Mr. Christensen: Mr. Warne, you of course know that that was just a kidding remark to Mr. Finley.

Mr. Warne: I understand that. I know you did not intend it.

(Testimony of Lawrence Barnett)

Mr. Christensen: Keep your voice down now, please.

The Court: You gentlemen ought to keep your own comments and your own feelings and interests to yourselves in this courtroom, all of you, and not give any manifestation of conduct that would be unbecoming, or that would be, perhaps, prejudicial to the jury.

Mr. Christensen: I think, if it was heard by you, it was unbecoming.

The Court: I did not hear it. [1130]

Mr. Christensen: Anything that could be heard by Mr. Warne, I concede it was unbecoming. I just was kidding him, you know, and I was a little too close to them.

(Further proceedings in open court:)

The Court: Proceed.

Mr. Warne: May we have the last question?

(Record read by the reporter.)

Q. Did you discuss with anyone of your company, Mr. Stein, particularly, and Mr. Bishop—Mr. Stein signed the agreement, I believe—did you discuss with them on that occasion, or with Mr. Cramer on a prior occasion, any matter of attempting to limit or restrict the booking of bands in San Diego or the San Diego territory? A. No.

Q. Was there ever any conversation between you, Mr. Stein, or Mr. Bishop at any time that, by these agreements or by any act or conduct, there should be any restriction or restraint of the business of booking bands in San Diego? A. No.

(Testimony of Lawrence Barnett)

Mr. Christensen: Just a moment. May I ask that that be stricken as hearsay?

The Court: Yes; that will go out. You will disregard that, ladies and gentlemen, that last answer.

Q. By Mr. Warne: Do you remember the first occasion that you met with Mr. Finley? A. Yes.

Q. Was that the time that Hal Howard and Mr. Finley came to your office? A. That is right.

Q. That has been testified to here. Just relate your recollection of what occurred on that occasion?

A. Mr. Howard brought Mr. Finley in, introduced him to me, and Mr. Finley told me that he was intending to take over Mission Beach ballroom, he thought he would get the Mission Beach ballroom due to the fact that he had some very good political connections with the town. He said he was [1134] interested in putting in name bands and wanted to know if we had any bands available. I explained to him at that time that we had— [1135]

Q. Well, you explained. You stated to him?

A. I stated to him that we had a contract with Wayne Dailard which gave him the first refusal of bands we represented, and I suggested that the town was not big enough to maintain two ballrooms competing with name bands; that I didn't think either ballroom would make any money; that I thought it would be better, as long as he wanted to go into the entertainment business, for him to go to a town like Oakland, where our ballroom operator that we had there had not been doing too well because he had not been active in the business.

Mr. Finley also stated he might open a ballroom or build a ballroom in Burbank, and I suggested that might

(Testimony of Lawrence Barnett)

be a good idea since that center of the valley was building up very rapidly. Mr. Finley told me he would think the matter over and would get back to see us.

Q. Did he say anything at that time about Casino Gardens? A. No.

Q. That subject wasn't discussed at all?

A. Right.

Q. Did you tell him on that occasion he could not have bands? A. I did not.

Q. When next did you see Mr. Finley? [1136]

A. I believe the next meeting I had with Mr. Finley was the Copper Room meeting that has been mentioned before.

Q. Was there a meeting before you went to the Copper Room?

A. There was a meeting in my office. Mr. Finley and McDonald came into my office, and we started talking, and Mr. Howard came in while we were talking, and we then went to lunch. Mr. Finley told me he had been awarded the contract at the Mission Beach Ballroom and wanted to know what bands we had available. I again explained that we had this first refusal contract with Mr. Dailard, and we would have to submit the bands first to Dailard, and any bands Mr. Dailard turned down we would be glad to offer him.

And then he asked me if he could go to the band leaders direct. I said that was perfectly all right, we could not stop any band leader from dealing direct, and we wouldn't stop any band leader from dealing direct.

(Testimony of Lawrence Barnett)

Q. Was there a question of any band leader's name?

A. I believe Mr. Finley told me he was very friendly with Freddie Martin, whom he knew, and I also believe he talked about talking to Harry Owens.

Q. Was Harry Owens in the territory at that time?

A. Yes.

Q. Was there anything said about the availability of bands in that conversation? [1137]

A. No. Mr. Finley didn't know exactly when he was going to open, or what his opening date would be.

Mr. Christensen: May that last statement, "Mr. Finley didn't know when he was going to open," and so forth, go out?

The Court: Yes, the way it is stated.

Q. By Mr. Warne: Is that what he said to you?

A. Yes.

The Court: Now it will stand.

Q. By Mr. Warne: Did he talk about wanting a band for his opening? A. Yes.

Q. What did you say?

A. I told him we would try to see if we could find something available for him.

Q. And you did?

A. No, we weren't able to make anything available.

Q. I see. Now, you went over to the Copper Room and had lunch. There has been something said about Jan Garber. Did Jan Garber go to lunch with you?

A. Jan Garber did not go to lunch with us, no.

Q. Did you see him that day?

A. I believe we passed Jan Garber going out.

Q. He was at another table, or some place?

A. I believe he was coming in with Mr. Thayer.

(Testimony of Lawrence Barnett)

Q. Was Mr. Thayer at your lunch? [1138]

A. No.

Q. Who was present at this lunch?

A. Hal Howard, Mr. Billy McDonald, and myself.

Q. And Finley?

A. And Finley. Pardon me.

Q. I take it there was a lot of conversation. You haven't related all of the conversation?

A. No, we talked about a lot of things. I can't remember about everything we talked about. I think we talked a little about the Trianon, and a few bands were mentioned that might be available for that ballroom.

Q. Now, then, I believe the next episode was the Paul Martin booking. Do you remember the Paul Martin booking into the Trianon? A. I do.

Q. What part did you have to play in that?

A. As I remember, Mr. Howard brought Mr. Finley into my office and he said he had made a booking for Paul Martin at the Trianon Ballroom, and had discussed it with Paul Martin and confirmed the engagement. I said, "Did you definitely confirm it, and Paul Martin definitely confirm it?" He said, "yes."

I told him he had better tear off the M. C. A. names and the pictures and the publicity, and put the contract on the union form of contract. [1139]

Q. Was Mr. Finley there at the time?

A. Yes.

Q. Did Mr. Howard at that time ask you why this should be done, or did Mr. Finley ask you why?

A. No.

Q. And you didn't tell them why?

A. I didn't tell them why.

(Testimony of Lawrence Barnett)

Q. Now, do you remember about this time having some conversations—well, this has been suggested: Why did you do that? A. Why did I do it?

Q. Yes.

A. Well, Hal Howard was a new man in our office. I knew he had already made the commitment, and I didn't want to embarrass ourselves with Wayne Dailard. I thought if we kept M. C. A.'s name out of it, we wouldn't be embarrassed.

Q. That is, you knew Martin had not been submitted to Dailard? A. That's right.

Q. About this time, or along this time, did you have any conversations with Mr. Ross of our firm, N. Joseph Ross? A. Yes, I did, with Mr. Ross.

Q. What conversation did you have with him relative to Mr. Finley's request for the booking of bands at Mission Beach? [1140]

A. Mr. Ross, I believe, came out to see me and also sent me several memos on the matter, advising me that Mr. Finley had been in or his attorney had talked to him, and we should try to get some bands available for Mr. Finley. I told Mr. Ross at the present time we didn't have any bands—

Mr. Christensen: Just a moment. May I interrupt? May I interpose an objection here, that it is hearsay?

The Court: No, I think the witness is charged as a co-conspirator in the case and has a right to disclose to the jury what he did.

Bear in mind, ladies and gentlemen, that in this case there is one corporate defendant, and then there are other personal defendants as well, and they are all charged

(Testimony of Lawrence Barnett)

with being members of the conspiracy with the witness Dailard. The evidence may be relevant as to one and not as to others, or it may be relative as to more than one and not as to all. But this witness has a right to present his situation to the jury and have it considered. Overruled.

Q. By Mr. Warne: Now, I believe you were interrupted.

A. I was interrupted, and I don't know where I was.

Q. Well, let me ask a new question and pick it up more quickly. You were relating the conversation with Mr. Ross, or conversations. Did you have more than one conversation?

A. I believe I had several conversations with Mr. Ross. [1141]

Q. Was the contract, or either of the contracts before you on any one of those occasions? I am speaking now of Defendants' Exhibits E or F.

A. I don't believe so.

Q. All right. Now, relate the conversation.

A. Mr. Ross asked me if we couldn't find some bands for Mr. Finley and, in fact, I believe at one time he even sent me a note of dates Mr. Finley had available for booking, and asked me if there weren't some bands that could be made available to go to San Diego to play for Mr. Finley. I told Mr. Ross that there was a shortage of bands at the present time, that there weren't enough to go around, and we were playing them at Pacific Square sometimes two and three times.

Q. Do you recall that you submitted or had this Defendants' Exhibit F sent to his office, to Mr. Ross, for perusal?

A. I don't remember.

(Testimony of Lawrence Barnett)

Q. Do you recall Mr. Ross talking to you about this subject-matter, namely, that there had been a suggestion by Mr. Finley's attorney that there would be a likelihood of an anti-trust suit if you didn't give him bands?

A. Yes.

Q. And did Mr. Ross consult with you with reference to that claim? A. That's right.

Q. What was the conversation in that regard? [1142]

Mr. Christensen: Again, your Honor, I may be all wrong, but I want to suggest that that is hearsay, and I object on that ground.

The Court: It is the same matter. It isn't hearsay so far as the defendant Barnett is concerned. It is direct, positive testimony with respect to his activities.

As I stated before, ladies and gentlemen, and as I restate and reinstruct you at this time, this may be material and relevant as to one of the defendants and not as to others, and it may be material as to all of the defendants. This matter will be for you, under the proper instructions, later on. But you must bear in mind throughout the case that the case is not directed solely against one defendant. It is directed against one corporate defendant and other personal defendants who are named in the complaint, one of which is the witness on the stand. Overruled.

Mr. Warne: Now, may I have that question again, please?

(The question was read.)

Q. By Mr. Warne: That is with reference to the threat of an anti-trust suit.

A. Mr. Ross told me they were threatening to sue if we weren't able to sell them bands, and he asked us

(Testimony of Lawrence Barnett)

to please try to find some bands, he didn't want to get in any law suits, if possible.

Q. Now subsequent to that did you give any instructions [1143] to anybody?

A. Yes, I sent the list to Mr. Hal Howard and to Mr. Bishop, and asked them if they couldn't find some bands available for Mr. Finley.

Q. Now, did you communicate to Mr. Bishop the fact that Mr. Ross had been over to see you? A. Yes.

Q. And also, to Mr. Howard? A. Yes.

Q. Have you had any conversations with Mr. Finley since the 21st of March, 1945? That is the date the complaint was filed here?

A. Yes, I have had several conversations with Mr. Finley.

Q. With reference to what did you have conversations with him?

A. With reference to bands at Casino Gardens, and with reference to—he was looking for a house to rent, and I can't remember all the matters; with reference also to a benefit he was running down at Casino Gardens for the Examiner people, and asked me to help him out and try to get him some talent.

Q. And did you?

A. I helped him and got him Carmen Cavallero to come out from Ciro's and appear there. [1144]

Q. And when you spoke of Casino Gardens, was that with reference to booking bands into Casino Gardens?

A. Yes.

Q. —at the time he was a part of the management at Casino Gardens? A. Yes.

(Testimony of Lawrence Barnett)

Q. Now, in any of those conversations did he ever request of you or discuss with you the booking of any bands at Mission Beach? A. No, he did not.

Q. Ever raise the question at all?

A. No. I believe the only time that the question was ever mentioned was at the meeting I had with him after the Tommy Dorsey opening. He told me he had bought Casino Gardens, and wanted to be friendly with us at Casino Gardens, and said, "Even if we are having trouble at the other—at the Mission Beach Ballroom," he said, "I still want to buy bands from you at Casino Gardens."

Q. Now, there has been something mentioned here about the King Sisters. The King Sisters are an act, an attraction, and known as that; is that correct.

A. Correct.

Q. There has been introduced in evidence here this yellow memorandum, the inter-office communication, marked "Ken." Do you recognize that as being Mr. Later's signature? [1145] A. That is right.

Q. And this came to you direct? A. Right.

Q. And that is the method you have in the business there? A. That is the method.

Q. Then what did you do with it?

A. I passed it on to Mr. Bishop and asked him to check on it and let Mr. Later know.

Q. Had there been any discussion prior to that time in your office with reference to Mr. Dailard wanting this attraction at Pacific Square? A. No.

(Testimony of Lawrence Barnett)

Q. Then after you passed this on to Mr. Bishop, what further was done about it in so far as you were concerned?

A. Well, there was nothing so far as I am concerned, that was done about it. I mean the booking was made, but I had nothing to do with it.

Q. I call your attention to the fact that January 11th is the date of this memorandum. Do you remember exactly when you had it in your hands?

A. I assume it must have been on the same day, or, in any event, on the next, because we try to pass the inter-office memos around on the same day, if possible.

Q. It is the custom in the trade or in your office to pass [1146] those on from one to another rather than have a conversation? A. That's right.

Q. When you handed that to Bishop, how much later would that be?

A. I imagine the same day or the next day.

Q. You say you imagine. You mean in the ordinary course that is the way it would go? A. Correct.

Q. Now, with reference to Mr. Later, do you recall him discussing with you the booking of the King Sisters for Mr. Finley at Mission Beach?

A. I believe Mr. Later mentioned that he was submitting the King Sisters to Mr. Finley.

Q. When an attraction like this is in the office or is open for booking, what is the ordinary custom with reference to salesmen booking the account?

A. The policy is when an attraction or a band is available, we submit them to every customer that can possibly use them.

(Testimony of Lawrence Barnett)

Q. And what date is ordinarily selected as being the—

A. The soonest date you can possibly get, because you don't want to leave any open time for the attraction to be out of work or lose any money for them.

Q. That is the ordinary method in the operation of your office; is that right? [1147] A. Yes.

Q. In so far as you know, was it deviated from in this instance? A. No, sir.

Q. Did you direct either Mr. Bishop or Mr. Later to deviate from that method? A. No.

Q. Was there any direction on your part for the booking of the King Sisters with Mr. Dailard at Pacific Square rather than at Mission Beach? A. No.

Q. Who handled the booking of the King Sisters at Pacific Square? A. Mr. Bishop.

Q. Did you have anything to do with completing it, on your part at all? A. Not at all.

Q. Was that also in the ordinary course?

A. That is true.

Q. Did Mr. Later, prior to the time that he went to New York, and I believe you said that was the 19th of January—did he tell you that he had booked the King Sisters into Mission Beach, had made arrangements for it, and that you should follow through?

A. No. [1148]

The Court: I think we will suspend now until 2:00 o'clock. Ladies and gentlemen, remember the admonition and keep its terms inviolate. I want to confer with counsel for a moment off the record.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p. m. of the same day.) [1149]

Los Angeles, California, Friday, February 8, 1946.
2:00 p. m.

The Court: All present. The case on trial.

Mr. Doherty: If the court please, should we take up at this time the matter of the books that were requested to be brought in with reference to Mr. Dailard? That is the reason I am bringing it up at this time, rather than giving it to plaintiff's counsel at the last moment. When we recall Mr. Dailard, I would rather he have these records in advance so that he could have his accountant go over them.

Mr. Christensen: I would appreciate that, Mr. Doherty. Thank you.

The Court: They are produced. The record will so show, and counsel for defendants is delivering them to counsel for plaintiff for further inspection and consideration. They should be, of course, sequestered so that we will know who is looking at them and hold those people responsible who are doing that.

What are your desires in the matter, gentlemen? They are your books.

Mr. Doherty: They are Mr. Dailard's original records, but I will entrust them with Mr. Christensen and anybody that he desires to give them to for examination.

The Court: So long as we know that counsel, Mr. Jaffe or Mr. Christensen or his associate, see to it that they [1150] remain within their personal supervision and surveillance at all times.

Mr. Christensen: Yes, your Honor. May that include Mr. Karp?

The Court: Yes.

Mr. Christensen: Inasmuch as I may want him to go out in the clerk's office.

The Court: He was the one I mentioned as an associate. You may call him Mr. Karp now.

Mr. Christensen: Thank you, your Honor.

Mr. Doherty: Will it enable counsel for the plaintiff to be in a better position to examine the books if we put Mr. Dailard on and give the figures that Mr. Dailard is going to call attention to out of the books, so that that would give them a better opportunity to examine the books for those particular items?

I have given counsel a copy of the profit and loss statement for the Beach Amusement Enterprises from January 1, 1944 to December 31, 1944, upon which Mr. Dailard will be examined.

The Court: I think it would be better, probably, if we concluded with Mr. Barnett. The mind of the jury, as well as of the court, as far as that is concerned, follows these things a little more sequentially.

Mr. Doherty: Yes, your Honor. [1151]

The Court: And I am inclined to think if we get from a narrative into a financial statement, that we will not be able to follow the testimony as closely. So I think Mr. Barnett had better resume the stand.

LAWRENCE BARNETT,

called as a witness by and on behalf of the defendants, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination (Resumed)

By Mr. Warne:

Mr. Warne: May I have the last question and answer, please?

(Record read by the reporter.)

Q. Mr. Barnett—I am showing counsel a document—by the way, so that I may follow the same line, when did Mr. Later leave your company, the employ of your company?

A. I believe it was around the first or second week in February. I am not positive of that. I could look up the record.

Q. Had there been any, shall we call it, disagreement of any kind between you or your company and Mr. Later at or shortly before he left the employ of the company?

A. Yes.

Q. I show you a carbon copy of the memorandum dated February 2, 1945 and ask you if you ever saw the original of [1152] that? A. Yes.

Q. You received that from whom?

A. Mr. Joe Ross.

Q. Your attorney? A. Right.

Q. Attorney for the company? A. Right.

Mr. Warne: If the court please, I will offer the memorandum of February 2, 1945.

Mr. Christensen: Your Honor, in addition to the rule of hearsay, may I add at this time or suggest to the court that it is self-serving?

(Testimony of Lawrence Barnett)

The Court: May I see it? [1153]

Mr. Warne: May I ask one foundation question first?

Q. By Mr. Warne: When did you receive the original of that with reference to the date it bears?

A. I think it says February 2nd.

Q. Was it on or about that date?

A. On or about that date.

The Court: I think this is inadmissible. Objection sustained. Mark it for identification.

Mr. Warne: If you please, will you mark it as the Defendants' Exhibit next in order?

The Clerk: Defendants' Exhibit N, for identification.

(The document referred to was marked as Defendants' Exhibit N, for identification.)

Q. By Mr. Warne: I show you a memorandum dated February 20, 1945, and ask you if you saw the original of that memorandum? A. Yes.

Q. When, with reference to the date it bears, approximately?

A. On or about February 20th, 1945.

Mr. Warne: If the court please, I offer in evidence the memorandum referred to.

Mr. Christensen: The same objection, your Honor, without restating it, if I may.

The Court: Was that an inter-office memorandum of the [1154] defendant corporation?

Mr. Warne: No, it is not, your Honor.

The Court: I see. It is the same as the other?

Mr. Warne: This foundation question, please:

(Testimony of Lawrence Barnett)

Q. From whom did you receive it?

A. Mr. Joe Ross, our attorney.

Q. That is attorney for the company?

A. Right.

The Court: May I see the other one, Mr. Figg?

(The document referred to was handed to the court.)

The Court: Objection sustained.

Mr. Warne: May it be marked, for identification, as the defendants' next in order?

The Court: Yes.

The Clerk: Defendants' Exhibit O, for identification.

(The document referred to was marked as Defendants' Exhibit O, for identification.)

Q. By Mr. Warne: Mr. Barnett, in the various dealings that you had with Mr. Finley, or with any person employed under your supervision relative to him securing bands or orchestras to play at the Mission Beach Ballroom, were any of such acts done for the purpose or with the intent of restricting and preventing the performance of orchestras or the booking of the performance of orchestras in the Mission Beach Ballroom? [1155]

A. No.

Q. Did you ever have any discussions or conversations with Mr. Bishop, or with Mr. Stein, or the three of you, in which there was discussed any course of conduct which should be followed with the intent or for the purpose of restricting and preventing the booking of orchestras at the Mission Beach Ballroom in San Diego.

A. No.

(Testimony of Lawrence Barnett)

Q. Now, I believe you said that you had seen Mr. Finley from time to time, particularly after he went into the management of Casino Gardens; is that correct?

A. Correct.

Q. If Mr. Finley had requested of you that bookings be submitted, that is to say, the names of orchestras or band leaders for the purpose of booking bands at the Mission Beach Ballroom, would you have considered his request?

Mr. Christensen: To which we object, first, on the ground that it calls for speculation, and, second, it is self-serving.

The Court: I think that is conjectural. Sustained. Proceed.

Q. By Mr. Warne: Do you know Birnie Cohen?

A. Yes.

Q. When did you see him next before the time you saw him as a witness in the court room? [1156]

A. The Friday before the trial started.

Q. Where?

A. He came to our office at 9200 Wilshire Boulevard.

Q. And did he talk to you? A. Yes.

Q. Was that by appointment?

A. No, he just dropped in to see me.

Q. You have known him for a number of years?

A. About ten years.

Q. And done business with him over a part of that period? A. Yes.

Q. Sold him bands when he was running the Casino Gardens? A. Right.

Q. At that time was there any conversation relative to Mr. Finley, on that Friday morning? A. Yes.

(Testimony of Lawrence Barnett)

Q. Relate it, please.

A. Mr. Cohen came in to see me and told me he had been subpoenaed as a witness for Mr. Finley, that he was very happy that he could appear at this trial, because he said he would really like to tell what he felt about Mr. Finley. He said he felt that Mr. Finley was not a good manager, that he was doing all the work, that Finley was taking all the glory, [1157] and he felt Finley was a big promoter, and in the exact words he said, he said he was a phony, and he said he was very happy to go down to court to tell it.

Q. By the way, one other question I didn't go into, and should have. Did you ever have any discussion with Mr. Michaud, who has been described here as Tommy Dorsey's personal manager or manager of his orchestra, relative to his playing at Mission Beach? A. Yes.

Q. Where?

A. At the opening at the Plaza Hotel in New York City.

Q. Who was present?

A. Mr. Bishop, Mr. Michaud and myself.

Q. Relate the discussion, please.

Mr. Christensen: To which we object as hearsay.

The Court: Sustained.

Q. By Mr. Warne: Did you ever have any conversation with any other band leader who is represented by Music Corporation of America, relative to this, that is, that band leader's playing in Mission Beach?

A. Yes.

Q. With whom? A. Charles Barnet.

(Testimony of Lawrence Barnett)

Q. Did Charles Barnet play at Mission Beach?

A. Yes. [1158]

Q. Where did that conversation occur?

A. The conversation took place in New York City.

Q. Will you relate it, please?

Mr. Christensen: To which we object as calling for hearsay.

The Court: Sustained.

Q. By Mr. Warne: Subsequent to that conversation did Mr. Barnet play Mission Beach? A. Yes.

Q. Did you at any time ever state to Mr. Barnet that he should not play Mission Beach? A. No.

Q. Did you ever at any time say to Mr. Michaud that Tommy Dorsey should not play at Mission Beach?

A. No.

Mr. Warne: Cross-examine.

Cross Examination

By Mr. Christensen:

Q. Had you asked Birnie Cohen to be a witness for you or for M. C. A. at this trial? A. No.

Q. You discussed that, though, didn't you?

A. No.

Q. Did this conversation that you have told us took place between you and Birnie Cohen take place in the presence [1159] of any other person? A. No.

Q. He came into your office and told you that?

A. Yes.

Q. No person except you and Birnie Cohen were present? A. That's right.